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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

EASTERN STATES PETROLEUM CORP.,
Appellant,

v.

WILLIAM P. ROGERS,
Attorney General of the United States,

GEORGE COCHRAN DOUB,
Asst. Attorney General, Civil Division,

ROBERT B. ANDERSON,
Secretary of the Treasury,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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Secretary of the Treasury,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

Eastern States Petroleum Corp. appeals from a judgment of the District Court for the District of Columbia, entered on December 10, 1958, which dismissed an action by plaintiff-appellant brought under 28 U.S.C. §§ 1331 and 2282. Appellant submits this Statement to show that this direct appeal comes within the obligatory jurisdiction of this Court provided for by 28 U.S.C. § 1253 and that the

questions presented are so substantial as to require plenary consideration for their proper resolution.

Opinions Below

The memorandum opinion filed in the District Court by the single judge who ordered the dismissal, after refusing to convene a court of three judges, is unreported. The Memorandum and Order are printed in an Appendix, *infra*.

An opinion by Chief Judge Prettyman of the District of Columbia Circuit, supporting his order refusing to designate two additional judges to complete the full court of three judges needed to hear a motion, pursuant to 28 U.S.C. 2284(5), for review of the single judge's action, is also unreported; the opinion and order is also printed in the Appendix, *infra*.

(An unofficial record of the basic documents filed by the parties below is printed as Appendix A of a Petition for Writs of Mandamus which Eastern States has also moved leave to file because of uncertainty with respect to the currently proper form of proceeding for effecting appellate review of the orders below).

Initial Showing of Jurisdiction

Plaintiff-appellant's action claimed a permanent injunction restraining the defendant officers from invading specified Constitutional rights by enforcement of a former Reciprocal Trade Agreement Act as construed by the Court of Customs and Patent Appeals. The action was brought under 28 U.S.C. § 1331. That the requisite amount was in controversy was shown on the face of the Complaint.

The requirement of 28 U.S.C. §§ 2284 and 2282 that "actions", asserting claims or "applications" for perma-

nent injunctions of the type described in § 2282, must be heard and determined by a district court of three judges was called to the attention of the District Court below by plaintiff through a written application for the convening of a court of three judges. But the action was dismissed, for lack of jurisdiction over the subject-matter, by a judgment of the District Court entered on December 10, 1958 on the order of single District Judge McGarraghy, after a combined hearing, before him alone, on plaintiff's application for a three-judge court, and on a motion to dismiss filed by the defendants.

Plaintiff sought to have these actions of the single judge reviewed by a full court of three judges, pursuant to 28 U.S.C. § 2284(5); but, its application to Chief Judge Prettyman for him to designate two judges to complete the full court of three judges need to hear plaintiff's Motion For Review was denied by the Chief Judge, after an adversary hearing on notice, by an order entered on January 8, 1959.

A notice of a direct appeal to this Court from the judgment dismissing the action was served, and was filed in the District Court, on February 2, 1959. Orders were entered on March 30 and on April 30, 1959 which respectively extended the time for docketing this appeal to May 1, 1959 and then to May 20, 1959.

The jurisdiction of this Court over a direct appeal from a final order, in an action of this type, which denies a permanent injunction is provided by the expressed terms of 28 U.S.C. § 1253. It is our position that *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10 (1930) and the other decisions under the appellate review provisions in *some* of the three-judge statutes that preceded consolidated Section 1253, which established that a direct appeal was *not* authorized when an order, denying an injunction, sought

to be appealed, had *in fact* been entered by a *single* judge, have been superseded.[1] Their statutory grounding was directly undercut by the integrative revision in 1948 of *all* the three-judge statutes which yielded the present set of Sections of Title 28, of which Section 1253 is the terminal, appellate review, component. And, contextual support was removed in 1954 by the reform of appellate practice effected by this Court's abolition of "allowance of appeal" practice. See Revised Rule 10(4).

This Court has not yet written an opinion about the impact of these changes, upon the *Stratton* line of authority. The following references seem, however, to be pertinent to the question. See, under the predecessor of Section 1253 covering appeals in actions for review of I.C.C. orders, *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132 (1947) (determining, on a direct appeal from a final order *of two judges*, by exercise of jurisdiction to determine jurisdiction, that the two judges lacked authority to decide the action by themselves). *Compare Horton* v. *Humphrey*, 352 U. S. 921 (1956) *affirming*, by memorandum order, 146 F. Supp. 819 (D.D.C. 1956) (judgment of dismissal, for lack of District Court jurisdiction, entered by single judge at direction of three judges) *with Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*

[1] In such situations this line of authority permits review of issues over single judge or three judge authority exclusively through proceedings in this Court for writs of mandamus to require a single judge to vacate his independent order and to act to convene a three-judge court. Beyond *Stratton* itself, see, e.g., *Ex parte Metropolitan Water Co.*, 220 U. S. 539 (1911); *Ex parte Poresky*, 290 U. S. 30 (1933). Cf. *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386 (1934); *California Water Service Co.* v. *City of Redding*, 304 U. S. 252 (1938). But cf. *Norumbega Co.* v. *Bennett*, 290 U. S. 598 (1933). Compare *Ex parte Buder*, 271 U. S. 461 (1926) (deliberating and denying a petition for a writ of mandamus to a single judge to require him to "allow" a direct appeal); then see Revised Rule 10(4)(1954).

and *Ex parte Poresky*, *supra* note 1, as argued by the appellees in *Horton* in support of the dismissal alternative of their motion to affirm or dismiss.[2]

The question of this Court's jurisdiction over this appeal is set forth in a general form as the first of the Questions Presented by this appeal, and the substantiality of our claimed right to appeal is further developed under the heading: The Questions Are So Substantial that they Require Plenary Consideration.

Statutes Involved

The following statutes are immediately and directly applicable to this appeal:

> *28 U.S.C. § 1253:* Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.
>
> *28 U.S.C. § 1331:*[3] The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.
>
> *28 U.S.C. § 2282:* An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and deter-

[2] See Appellee's MOTION TO AFFIRM OR DISMISS at 7-8 in note 4.

[3] The statute is quoted as it read at the time the action was commenced on June 2, 1958, before the amendments of July 25, 1958, 72 Stat. 415.

mined by a district court of three judges under section 2284 of this title.

28 *U.S.C.* § *2284:* In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

• • •

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

• • •

28 *U.S.C.* § *1583:* The Customs Court shall have exclusive jurisdiction to review on protest the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury; decisions excluding any merchandise from entry or delivery, under any provision of the customs laws; and the liquidation or reliquidation of any entry,

> or the refusal to pay any claim for drawback or to reliquidate an entry for a clerical error as provided by the customs laws.

Plaintiff-appellant's action challenged the Constitutionality of the Reciprocal Trade Agreements Act as amended and extended through 1950 to 1952, 19 U.S.C. § 1351 (1952 ed.), as construed by the Court of Customs and Patent Appeals to sustain Presidential Proclamation No. 2901 of September 6, 1950, 64 Stat. (Part II) A427. That Act and that Proclamation are set forth, along with other statutes pertinent to deliberation of this case in Appendix B of our alternative Petition For Writs of Mandamus.

Questions Presented

I. Did the 1948 revision of the statutes on three-judge proceedings, 28 U.S.C. §§ 2281, 2282, 2284, 1253, provide some less extraordinary form of proceeding through which to seek review of, and relief from, a decision by a single judge, in an action in which an application or claim for an injunction is asserted which is of a type that requires processing by a court of three judges, which dismisses the action on the ground that any district court, however constituted, would lack jurisdiction over the action, or is it still necessary, as under former statutes as construed in *Stratton* v. *St. Louis Southwestern R. Co.*, 282 U. S. 10 (1930), to make use of a direct petition to this court for an extraordinary writ of mandamus?

II. Has the former authority of a single judge to enter an order finally dismissing, by himself, for lack of jurisdiction, an action in which an application or claim for an injunction is asserted which is of a type that (otherwise) requires processing by a court of three judges, which was established by *Ex parte Poresky*, 290 U. S. 30 (1935), re applications now encompassed by 28

U.S.C. § 2281, and extended to applications now encompassed by 28 U.S.C. § 2282 in *California Water Serv. Co. v. Redding*, 304 U. S. 252 (1938), survived the enactment by Congress of the Act of 6 April 1942, 56 Stat. 199 as perfected in 1948 by 28 U.S.C. §§ 2281, 2282, and 2284?

III. Does the exclusive jurisdiction over protest proceedings, vested in the Customs Court by 28 U.S.C. § 1583, wholly divest the District Courts of jurisdiction over a Complaint, like appellant's, which raised issues susceptible of adjudication by the Customs Court, but which is carefully and restrictively formulated so that it (a) asserts an action arising under the Constitution of the United States, (b) expressly invokes the jurisdiction over such actions vested in the District Courts by 28 U.S.C. § 1331, and (c) alleges special circumstances justifying a present exercise of jurisdiction and a present grant of injunctive relief without delay for further resorts to the primary jurisdiction of the Customs Court?

IV. Assuming that Question 3 will be resolved in favor of District Court jurisdiction under 28 U.S.C. § 1331, is there any other statutory or precedential rule-for-decision, which should be construed and applied so as to affirm the order of dismissal, over appellant's persistent objection that any rule-for-decision which is so construed and applied in the present circumstances, will invade the right to a process for resorting, of right, to a court organized under Article III, Section I, before an ultimately adverse decision on a substantial constitutional claim, which is conferred upon a person, like appellant, who asserts such a claim, by Article III and the Fifth Amendment?

V. Assuming that the questions of construction presented in Question 3 and 4 were to be resolved so as to

deny the existence of District Court jurisdiction or so as to recognize a bar to exercise of such jurisdiction that must be enforced by a final dismissal, rather than a stay, then, mustn't the statutory or precedential rule-for-decision which seems to dictate either of those outcomes be held unconstitutional and ineffective because incompatible with the process right conferred on appellant by Article III and the Fifth Amendment?

Statement of the Case

Through this appeal, or its alternative Petition for Extraordinary Writs, Eastern States Petroleum Corp., seeks to have this Court order the adjudication by a District Court of three judges of an action which was dismissed below by a single District Judge. The action asserted a claim for a permanent injunction restraining defendant officers from enforcing the Reciprocal Trade Agreements Act, as amended and extended through 1952, as it has been construed to read by the Court of Customs and Patent Appeals. The Complaint expressly grounded its claimed right to that relief directly on the Constitution, and it expressly invoked the jurisdiction over actions arising under the Constitution which is vested in the District Courts by 28 U.S.C. § 1331.

The Complaint stated the basic rights claimed to be conferred on the corporation by the Constitution as follows:

> 3. Plaintiff's interests as an importer in being free from executive interference resulting in the exaction of taxes not authorized by Acts of Congress are constitutionally recognized and secured by Article I, Section 8 of the Constitution of the United States and are further protected by the Fifth Amendment against misexercise of the legislative authority of Congress to determine, or of

> executive authority to enforce, liabilities or pay taxes on imports.

The asserted constitutional defect in the Trade Agreements Act as extended through 1952, as it had been judicially construed to read, was stated in the Complaint as follows:

> 10. • • • said Act as construed and applied effected a delegation to the President of a power to determine rates of duty which was so inadequately limited as to violate due process and to constitute an abdication of Congressional responsibility under Article I, Section 8.

The Constitutional controversy between Eastern States and the defendant officers was started, ripened and presented to the Court below as follows:

On September 6, 1950 President Truman promulgated Presidential Proclamation No. 2901, 64 Stat. (Part II) A427, purporting to increase, as of 1 January 1951, the rate of duty on petroleum and petroleum fuel oil to ½ cent per gallon from ¼ cent per gallon, the existing rate, an increase of 100% over that existent rate.

Eastern States was advised that Proclamation No. 2901 was invalid because its 100% increase of duty-rate violated a 50% limitation on Proclamation-increases clearly expressed in the Reciprocal Trade Agreements Act, as amended and extended through to 1950 and 1952, 19 U.S.C. § 1351 (1952 ed.).

At various times between 1 January 1951 and October 11, 1952, (when the ¼ rate of duty was reestablished by Proclamation No. 2989, 67 Stat. C11), Eastern States imported petroleum or petroleum fuel oil on which taxes at ½ cent per gallon were demanded by the Customs Collector at Houston, Texas pursuant to Proclamation 2901.

Eastern States paid the sums so demanded for the release of its importations but filed written protests with the Collector challenging the rate, and thus the amount of said exactions, which totaled $131,911.59.

After reviewing his decisions, as he is required to do by 19 U.S.C. § 1515 (1952 ed.) when protests are filed, the Collector affirmed his decisions. Then, as he is also required to do by Section 1515, the Collector transmitted the protested decisions to the Customs Court for judicial review.

Proceedings in the Customs Court on the aforementioned cases were stayed by agreement between Eastern States and George Doub, one of the defendants below. As stated in the Complaint:

> 13. Subject to the supervision of defendant Rogers and pursuant to the law and the practice in such customs controversies, defendant Doub has authority to decide the final position to be taken by the Executive Department in response to an importer's protest against such assessment of taxes by the Treasury Department, making the ultimate executive evaluation of the legal contentions advanced in support of said protests. When a protested assessment is determined by defendant Doub to be legally sound, he opposes importer's protest and the controversy, thus ripened, is adjudicated by the Customs Court. Said adjudication is reviewable by appeal to the Court of Customs and Patent Appeals and the latter judgment may be reviewed by the Supreme Court of the United States only on Writ of Certiorari. When said defendant Doub decides that a protest is legally sound and that there was illegality in the assessment referred to in the protest, he enters into a stipulation with the attorneys for the protesting party acknowledging the facts with respect to the assessment and thereby provides a basis upon which the Customs Court

> may enter a judgment directing a reliquidation of the entry involved and a reassessment of the import tax at the rate acknowledged to be correct through the stipulation of the parties.

The stays were agreed to in deference to two test cases of other importers, which Doub and counsel for Eastern States were also arguing, that involved essentially the same questions of law.

In both test cases the Customs Court, by unanimous decisions, held Proclamation 2901 to be invalid because its proclaimed rate exceeded the 50% limitation on rate changes by proclamation expressed in 19 U.S.C. § 1351. In both cases the Court of Customs and Patent Appeals reversed, holding the limitation inapplicable to Proclamations like 2901 and rejecting the importers' contentions that with said limitation so removed the Act had not provided constitutionality adequate statutory guidance for exercise of the rate-changing power thus exempted from the percentage control. See *Metropolitan Petroleum Corp.* v. *United States*, 31 Cust. Ct. 71 (1953), *rev'd.* 42 C.C.P.A. (Customs) 38 (1954), *cert. den.* 348 U. S. 858 (1954) and *American Bitumuls & Asphalt Co.* v. *United States*, 37 Cust. Ct. 58 (1956), *rev'd.* 44 C.C.P.A. (Customs) 199, 246 F. 2d 270 (1957) *cert. den.* 355 U. S. 883 (1957).

This Court's denials of certiorari left a situation in which Eastern States was faced with the prospect that its ripened constitutional claim would be adversely resolved by apparently terminal decisions of the Court of Customs and Patent Appeals, an Article I court, if it pressed that claim through contested proceedings in the Customs Courts.

Thus, on advice of counsel, Eastern States then requested defendant Doub to reconsider the legal position

of the Executive on the constitutionality of the Act as it had been construed to read by the Court of Customs and Patent Appeals, demanding that he refrain from enforcing the Act as construed by not contesting Eastern States' protests. Doub rejected the demand.

Its constitutional controversy with Doub thus finally and separately crystalized, Eastern States filed an action for an injunction presenting this constitutional controversy to the District Court for the District of Columbia for its adjudication, alleging:

> 16. Now then, unless restrained by this Court, defendant Doub will proceed to enforce the aforementioned Act as construed, bring about its adjudicatory application to plaintiff by the customs courts, pursuant to their aforementioned precedent cases, thus invading plaintiff's constitutional right previously set forth in Paragraph 10.

It is this action which was dismissed by single Judge McGarraghy. In his brief Memorandum opinion, he merely said:

> The Court is of the opinion that the cause of action alleged in the Complaint is one that falls within the exclusive jurisdiction of the Customs Court under the provisions of Title 28 U.S.C.A., Sec. 1583. Since this Court is wholly without jurisdiction, it is not necessary to convene a three-judge court to pass on that question but action may be taken by a single judge, *Jacobs* v. *Tawes*, 250 Fed. 611.

The issue, now Question II, *supra*, concerning a single judge's present lack of authority to finally dismiss an action, asserting a claim for an injunction (otherwise) requiring processing by a court of three judges, when he concludes, by himself, that any District Court, however constituted, would lack jurisdiction over the action, was

raised by plaintiff's written argument in support of its application for the convening of a court of three judges and by defendants' written opposition thereto. Except for this issue, no one has thus far denied that the Complaint is so formulated that it asserts an application for an injunction which is of a type that is required, by 28 U. S. C. § 2282, to be processed by a court of three judges.[4]

The issue, now Question III, concerning the jurisdiction of any District Court, however constituted, over the action stated in the Complaint was raised below by plaintiff's alleging jurisdiction under 28 U.S.C. § 1331 and grounding its asserted right to recover directly on the Constitution and by defendants' moving for dismissal on the ground that the subject matter of appellant's Complaint is within the exclusive jurisdiction of the Customs Court pursuant to 28 U. S. C. § § 1583 and 1340.

Neither the argument in support of defendants' Motion to Dismiss nor Judge McGarraghy's Memorandum and Order granting said Motion challenged the substantiality of Eastern States' constitutional claim. And, appellant has not stated a question re substantiality as a Question Presented on this appeal; a contention of unsubstantiality would itself verge on unsubstantiality since there is no pattern of decisions by this Court, rejecting Con-

[4] Thus, on this appeal, we have not undertaken to directly argue a question with respect to whether a single judge still enjoys authority to finally decide an issue over, whether a *claim* for an injunction, which is asserted in an action, is or is not of a type which falls within the coverage of a three-judge statute. Indeed, while our presentation will show that Congress has clearly rerouted *jurisdictional issues* pertaining to a three-judge application or claim from the district judge to the court of three-judges, a persuasive argument for a similar rerouting of issues with respect to the coverage of Sections 2281, 2282, or 2325 of Title 28 would have to be grounded on considerations beyond Congressional command; concerning a rerouting of *issues* of *coverage*, the current sections and their legislative history are only suggestive, not compelling, as they are on the rerouting of *issues* of *jurisdiction*.

stitutional objections to any comparably unlimited Congressional delegation of its power and responsibility to determine tax rates, on which to ground a contention of unsubstantiality. (However there was some mention of unsubstantiality in the written argument in opposition to plaintiff's Application to Chief Judge Prettyman, and, if a question is raised on this appeal concerning the substantiality of Eastern States' basic constitutional claim, a documented answer can be found in Eastern States' Petition for Writs of Mandamus, Contention I, B, 4; there petitioner summarily documents the solidity of its constitutional claim incident to showing Reasons why this Court should exercise its discretionary appellate jurisdiction, invoked by that Petition, even if this Court concludes that its obligatory jurisdiction is not properly invoked by this direct Appeal.)

Question IV on this appeal encompasses questions of "remedial law" and of "primary jurisdiction" which were raised as issues in this case by defendants' Motion to Dismiss for failure to state a claim on which relief may be granted and by plaintiff's counter-motion for summary judgment. Judge McGarraghy did not reach these issues; but, some of the contentions, if sustained, would provide a basis for affirming the dismissal "on other grounds," and these grounds might be raised by this Court itself, even if not asserted by the respondents or the appellees. Thus, appellant is moved to anticipate the more serious of these latent questions by presenting Question IV and by summarily presenting our responses thereto.[5]

[5] We have not pressed on this appeal for relief from Judge McGarraghy's implicit denial of the counter-motion for summary judgment which we had filed, because of our belief that the issues "on the merits" that would thus be presented have not been properly ripened for adjudication here by a three-judge decision below, as required by *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132 (1947). However, if this Court considers those substantive ques-

Question V is presented as a live issue in this case because Judge McGarraghy's opinion and order for dismissal implied a silent rejection of the special right to be heard, which plaintiff claims under Article III and the Fifth Amendment, asserted in its Complaint and then pressed in its written and oral argument. The final order clearly rejected plaintiff's derivative contention, pressed in its written and oral argument, that a *stay* of the action, pending the termination of reactivated proceedings in the Customs Courts and a petition to this Court for certiorari, or a dismissal of the action expressly stated to be "without prejudice," was the *worst* (temporary) outcome that could be justified, out of deference to the primary jurisdiction, without invading plaintiff's process-right under Article III and the Fifth Amendment.

Question I, concerning the now proper form-of-proceeding for asserting a claim for relief from the dismissal of an action by a single judge when the asserted claim is primarily grounded on a contention that the action dismissed is of a type which requires processing by a court of three-judges, was first raised as an issue in this case by plaintiff's unsuccessful attempt to use a Motion For Review by a Full Court, pursuant to 28 U.S.C. § 2284 (5); the issue was ripened by the defendants' opposing contention in that proceeding that an appeal (of right) to the Court of Appeals is a now permissible appellate

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tions to have been adequately developed for present consideration here by the opinions of the Court of Customs and Patent Appeals, cited in the text, *supra*, we would not object to an order noting probable jurisdiction which would also expand the scope of the plenary hearing to encompass those issues. However, consideration here by *summary* procedure would not be at all proper in light of the solid *substantiality* of the constitutional question, (see text and reference, *supra*), despite this Court's denials of certiorari review of those decisions of the Court of Customs and Patent Appeals and the negative conclusions about the (relative) *public importance* of the questions of statutory construction and constitutional law presented by those petitions, which are suggested by their denial.

proceeding for asserting such a claim. Plaintiff's contention, that a Motion For Review is the now primary (trial-level) proceeding for asserting the aforementioned type of claim, for relief from a single judge dismissal, was rejected in Chief Judge Prettyman's opinion supporting his refusal to entertain plaintiff's application to him to designate two additional judges to complete the full court of three judges needed to hear the Motion For Review which was attached to the Application. The Motion-For-Review question is directly presented to this Court by the part of Eastern States' Petition For Extraordinary Writs which prays a writ directed to Chief Judge Prettyman. But, that question is also present on this appeal under the Question (No. II) whether a single judge may still *finally* dismiss by himself.

This appeal and the part of Eastern States' Petition for Extraordinary Writs which prays a writ directed to Judge McGarraghy both present the question whether or not a direct appeal to this Court is a now proper form of (ordinary) appellate proceeding for asserting the aforementioned type of claim, superseding a direct Petition to this Court for an extraordinary writ which has heretofore been the exclusive form of appellate proceeding for asserting such a claim. Of course, we must take directly inconsistent positions in the two alternative proceedings. And, obviously, our contentions in favor of a right of direct appeal represent our primary position.[6]

[6] Such a choice of positions was not so obvious decades ago when this Court recognized certain situations in which it was obligated to grant an extraordinary writ; the use of proceedings for extraordinary writs in the present type of situation was voluntarily initiated by a party plaintiff, who had been refused a three-judge hearing, over an objection that *direct appeal* was the appropriate form of proceeding, which was voiced by the state government lawyer who represented the respondent single judge and was buttressed by the written opinion of that judge. See *Ex parte Metropolitan Water Co.*, 220 U. S. 539 (1911) as noted hereafter at notes 32-6.

The Questions Presented are so Substantial that they Require Plenary Consideration

Question I: The Currently Proper Form of Appellate Proceeding.

I. The general phrasing of Question I anticipated a need to advance inconsistent contentions, on the question of the form of appellate proceeding which is currently proper in the present type of situation, in the alternative proceedings, new and traditional, to which it has seemed presently appropriate and justifiable to resort. That general phrasing of this Question also anticipated a procedural motion, prefaced to our Petition For Extraordinary Writs, for a simultaneous consideration of that document and this.

In our Petition we undertake to satisfy our obligation in such a document to demonstrate the "public importance" of this question concerning the currently proper form of appellate proceeding, (as well as of the questions "on the merits"). However, as Question I is presented by this "appeal" proceeding, as we understand our obligation, we must undertake to demonstrate the "substantiality", in two senses, of our claim that Section 1253 authorizes us to proceed by a direct appeal. First, we must show that this question as raised by our claim is "substantial", in the sense that it is not foreclosed from serious consideration by prior decisions on essentially similar claims; but then we are obliged to go on to show that our claim is "so substantial", weighty or solid that summary deliberation and rejection, without resort to plenary procedures, would be inappropriate or unjustified.

If it was not sufficient by itself, we have no doubt that we could briefly buttress our Initial Showing of Jurisdiction, *supra*, and establish that our appeal claim is not foreclosed from serious consideration by prior decisions. However, because of the character of the changes in, and affecting, the appeal provisions of the three-judge statutes, effected by the 1948 revision of Title

28, and because of the weight of the opposing holdings and supporting policies, a showing in support of our claim, adequate to withstand grave risk of summary deliberation and rejection, cannot be brief. While longer and more detailed than would ordinarily be proper in a Jurisdictional Statement, we submit that our showing is justified by the heavy burden of persuasion that we carry.

Section 1253 replaces and consolidates, or is integratively related to, all other statutory provisions authorizing direct appeals to this Court.[7] The former direct appeal provisions directly replaced by Section 1253 had been integral parts of separate, loosely related,[8] statutes dating from 1910,[9] 1913,[10] and 1937[11] which *required* that appli-

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[7] See the Reviser's extensive Notes to Sections 1252 and 1253. And see MOORE, COMMENTARY ON THE JUDICIAL CODE 482-6, 491, 541-4 (1949).

[8] While this Court said that these statutes were *in pari materia* and did sometimes resolve doubtful construction questions under one in light of holdings under another, some refined distinctions were made, and some obvious differences were recognized. Compare *California Water Service Co.* v. *City of Redding*, 304 U. S. 252 (1938); *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132 (1947) and *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171 (1939).

[9] Section 17 of the Act of June 18, 1910, 36 Stat. 557, which became Section 266 of the Judicial Code of 1911 when it was enacted March 3, 1911, 36 Stat. 1162. As amended in 1913 and 1925, § 266 was carried in Title 28, U.S.C. (1946 ed.) as Section 380. See PETITION, Apdx. B. This was the Act governing actions to enjoin enforcement of allegedly unconstitutional state statutes.

[10] The Judicial part of the Urgent Deficiencies Act of 1913, October 22, 1913, 38 Stat. 220, carried in Title 28, U.S.C. (1946 ed.) as Section 47. See also Section 47a (and see Reviser's Note to Section 1253). See PETITION, Apdx. B. This was the Act governing actions to enjoin the enforcement of orders of the I.C.C.

Various other agency statutes codified outside Title 28 incorporated the review provisions of this Act by reference; when the direct appeal provisions of this Act were replaced by Section 1253, it became their direct appeal provision. See Reviser's Note to Section 1253. However, the review provisions of those agency Acts were changed to route review proceedings into the Courts of Appeal by the Review Act of 1950, 64 Stat. 1129, 5 U.S.C. § 1031 *et seq.* (1952 ed.).

[11] Section 3 of the Judicial Reform Act of 1937, August 24, 1937, 50 Stat. 752, carried in Title 28, U.S.C. (1946 ed.) as Section 380a. See PETITION, Apdx. B. This was the Act governing actions to enjoin enforcement of allegedly unconstitutional federal statutes.

cations for injunctions described therein be processed, at the trial level, by courts of three judges and, at the appellate level, by this Court on direct appeals. The trial level provisions of these former statutes are now set forth, with a few very significant changes, in Sections 2281 (1910 Act),[12] 2282 (1937 Act) and 2325 (1913 Act)[13] as

[12] The change here redefined the cases required to be heard by three judges, re challenges to *state* statutes, so as to conform to the 1937 provisions, re challenges to *federal* statutes, carried into Section 2282. Three-judge courts are now required under Section 2281, as under Section 2282, whether or not an application for a temporary injunction is made and pressed in actions claiming permanent injunctions against the enforcement of allegedly unconstitutional statutes. The Reviser's note to Section 2281 expressly directs attention to the intended change, pointing out that it was accomplished by the following changes in statutory language:

> The words 'or permanent' were added near the beginning of the section as a substitute for the last sentence of such section 380, providing that the requirement as to the presence of three judges shall also apply to the 'final hearing *in such suit* in the district court.' (Emphasis supplied; this last sentence had been added in 1925 by the Judges Act, February 13, 1925, 43 Stat. 938).

The change in Section 2281, paralleled by the change in the wording of Section 1253 away from use of the phrases "in such suit" and "in such case" (in the former direct appeals provisions) over to use of the phrase "in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges", operates to expand the coverage of Section 1253. The changes should function to overrule a set of holdings, under a construction by this Court of the former phrase "in such suit", which required final hearings by three judges and permitted direct appeals from *final* orders only when the suit was one in which application for an *interlocutory* injunction had, in fact, been *pressed* and three judges *convened*. The holdings, and the rationale of the construction of "in such suit" on which they depended, are set forth in *Smith* v. *Wilson*, 273 U. S. 388 (1927), *Ex parte Hobbs*, 280 U. S. 168 (1929). See *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10, 14-5 (1930); and see *Healy* v. *Ratta*, 289 U. S. 701 (1933), and 292 U. S. 263 (1934). Cf. *Ex parte Buder*, 271 U. S. 461 (1926) summarized in note 20, *infra*.

[13] The changes here pertain to the procedures for processing the I.C.C. actions; the new uniform process set forth in Section 2284, to which Section 2325 expressly refers, works a change of the procedures under this predecessor Act in the direction of the 1937 Act. See Reviser's Note to Section 2325; and see note 14 *infra*. The changes include single-judge authority over applications for temporary restraints.

supplemented in each instance by Section 2284.[14] The central purpose of this revised set of Sections was to provide, by Sections 2284 and 1253, a uniform and rationalized set of provisions frameworking one basic three judge process, from initiation through appellate review, applicable to former and future acts requiring applications for injunctions to be heard and determined by courts of three judges[15]—except insofar as some such Act, not revised in 1948,[16] may otherwise provide.[17] In short, consolidated Section 1253 governs the appellate stage of a

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[14] Section 2284 was designed to set forth new uniform provisions governing the composition of, and the method of convoking, three-judge courts and providing the special procedures by which they are to function. See paragraphs six, seven and nine of the Reviser's Note to Section 2284 and paragraph four of the Note to Section 2281. Note that the latest, 1937 Act was taken as the model to which older Acts were tailored.

In the background of this movement away from undeliberated differences and toward uniformity, except when otherwise provided, is the work and Report of the special Committee of the Judicial Conference of the United States referred to in the above cited paragraphs of the Reviser's Notes. The Act of April 6, 1942, 56 Stat. 197, 28 U.S.C. § 792 (1946 ed.), on which subsection 2284(5) is built, was the first major contribution to the uniformity movement. All these materials and the legislative history of the Act of 1942 are extensively quoted and discussed in appellant's alternative PETITION at the places cited in its Index. See also notes 60-69, *infra*.

[15] See paragraph 8 of the Reviser's Note to Section 2284, and see note 14, *supra*.

[16] Major changes in the Acts of 1910 and 1913, effected by the 1948 revision in order to set up the basic new, uniform process were mentioned in notes 12-14, *supra*.

[17] There are "excepting" clauses both in Section 2284 and in 1253, which permit ready operation of deliberate departures from the basic uniform process in future Acts, despite the generality and prospective operation of the language in the positive provisions of both Sections. And, the "excepting clause" of Section 1253 immediately functioned to keep the positive terms of the Section from extending (or appearing to extend) authorization for direct appeals after 1948 to three-judge actions or to *interlocutory* injunction orders under pre-existent three-judge Acts codified outside Title 28 which had provided lesser rights of appeal. See MOORE, COMMENTARY ON THE JUDICIAL CODE, 541-4 (1949).

basically uniform three judge process now provided by Title 28 as revised in 1948.

The expressed terms of this consolidated Section 1253 clearly authorize a direct appeal in the present circumstances. The order of dismissal below clearly constitutes "an order * * * denying, after notice and hearing, a[n] * * * permanent injunction in a[ny] civil action * * *"[18] And, as documented hereafter,[19] there is very substantial basis for appellant's contention that its action was "* * * an[y] action, [suit or proceeding] required by an[y] Act of Congress to be heard and determined by a district court of three judges".

It is our position that an issue over whether an action is or is not of the type described in Section 1253 is an issue over which this Court has jurisdiction, on presentation on a direct appeal invoking 1253, in order to determine its jurisdiction over the merits of said appeal. This position is merely an application to the present circumstances of the main line of precedent under the three-judge-direct appeal statutes[20] and of principles of reformed appellate

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[18] See *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752 (1947) (affirming, because of failure to exhaust primary jurisdiction, an order of *dismissal* by Court of three judges); *Doud* v. *Hodge*, 350 U. S. 485 (1956) (reversal, *per curiam*, of order of *dismissal* by court of three judges erroneously grounded on lack of District Court jurisdiction); *Horton* v. *Humphrey*, 352 U. S. 921 (1956) (memorandum affirmance of *dismissal* by order of single judge pursuant to jurisdictional conclusions of court of three judges). Cf. *Traffic Telephone Worker's Federation* v. *Driscoll*, 332 U. S. 833 (1947) *mem. dismissing appeal from* 72 F. Supp. 499 (D. N. J. 1947) (*order*, by court of three judges which *stayed* proceedings in favor of state court proceedings). Compare *City of Meridian* v. *Southern Bell T. & T. Co.*, 358 U. S. 639 (1959).

[19] See the development of Question II, *infra*.

[20] See *United States* v. *Interstate Commerce Commission*, 337 U. S. 426 (1949); *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171 (1939); *Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298 (1913). But see *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10, 14-5 (1930) (when *single judge* decides an action by himself can only secure review of issues with respect to whether action properly

practice[21]. But, admittedly, if so construed and applied, Section 1253 will supersede decisions under some former three judge-direct appeal statutes. Our general position subsumes component points and supporting considerations in favor of such supersession, as follows:

1. The line of authority, restated in *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10 (1930), which construed the appeal provisions of the 1910 Act as *not* authorizing "direct appeals" to present questions of single judge or three-judge authority to enter injunction orders, when orders sought to be challenged on that ground had not *in fact* been entered by three-judges, has been superseded by the removal from revised Section 1253 of the former phrases, "in such suit" or "in such case", on which that construction of the former appeal provisions came to be grounded. "Such case" and "such suit" were read—probably influenced by the "optional" and contingent nature of the application for a temporary injunction which was then essential to operation of the three-judge requirement—as referring back to cases or litigations in which the required trial events had *in fact* taken place.[22] The pres-

required processing by three judges through petition to this Court for writ of mandamus to require the single judge to vacate his order and act to convene a three-judge court). But cf. *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132 (1947) (determining, on a direct appeal from a final order of *two judges*, that they had lacked authority to decide the three-judge action by themselves). Cf. *Ex parte Buder*, 271 U. S. 461 (1926) (deliberating and denying, *because the action did not come within the coverage of the three-judge statute*, a petition for a writ of mandamus to require the single judge who had decided the action to "allow" a direct appeal). And see the abolition of that allowance of appeal practice by Revised Rule 10(4) (1954). See notes 21 and 44, *infra*.

[21] See Revised Rule 10(4) (1954) abolishing "allowance of appeal" practice with respect to appeals to this Court, and see text and references at note 44, *infra*. See also write up of *Morton* v. *Humphrey*, in the INITIAL SHOWING OF JURISDICTION at note 2, *supra*.

[22] See note 12, *supra*.

ent phrasing of 1253: "* * * in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges," is clearly describing or referring to a type of action identified in terms of its *pre-trial* characteristics. This is the typical way of describing "actions", while "cases" are often typed in terms of trial-time events;[23] this present phrasing will not stand a construction which, in effect, adds a phrase: "Provided that a three judge court has, in fact, convened as so required by law."

2. Insofar as the construction against appeals from orders of single judges may have been originally grounded, in *Ex parte Metropolitan Water Co.*, 220 U. S. 539 (1911), not on the phrase "in such case" but rather on the phrase "after notice and hearing"[24], which *has* been carried over into Section 1253, the phrase should not be given any such appeal-precluding meaning, in its present setting, for the reasons which follow.

(a) Although the phrase "after notice and hearing" was also present in the 1913 Act, in the decision in *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132 (1947), just before the 1948 revision; it was not even argued that direct appeal was not the proper form of appellate proceeding for presenting the question, presented by appellant, whether

[23] Compare the majority and dissenting opinions in *Osborn* v. *Bank of the United States*, 9 Wheat. 738 (22 U. S. 1824) on the meaning of "cases" or "actions" "arising under" federal law and the proper time for making the measurement. Cf. *Murdock* v. *City of Memphis*, 20 Wall 590 (87 U. S. 1875).

[24] The parties had divided in their argument of the question of authority to proceed by direct appeal over the meaning to be attributed to the phrase "after notice and hearing". See Part III of each of Petitioner's Briefs, and see Respondent's Reply Brief at pp. 19-20. The Court's opinion does not make clear whether its conclusion against direct appeal is grounded on that phrase, the phrase "in such case", or on the implications of the statute as a whole.

two judges could *deliberate* and decide upon the order they had entered or whether deliberation and decision by three judges had been required. Moreover, this Court gave relief to the appellant when it upheld the argument appellant presented against two-judge authority. And, the 1948 revision sought to provide a basically uniform three-judge-direct appeal process, replacing the differing processes therefore existent, by conforming the 1910 Act and 1913 Acts to the 1937 Act;[25] the terms and legislative history of the 1937 Act show its provisions to have had a closer kinship to the 1913 Act, under which *Ayrshire* was decided, than to the 1910 Act, under which *Stratton* and *Metropolitan Water* were decided.[26] Thus, as it appears in consolidated Section 1253, the phrase "after notice and hearing" should not be afforded the appeal-precluding meaning that may have been attributed to it in *Metropolitan Water*, at the expense of the modern appellate procedure pursued without objection in *Ayrshire*.

(b) A straight-forward reading of the phrase "after notice and hearing" which will operate to preclude only direct appeals from *ex parte* orders, (granting or denying temporary injunctions), would be historically meaningful and pragmatically sound.

The phrase "after notice and hearing" has consistently appeared, ever since the original Act of 1910, as a restrictive modifier in the longer phrase: "an order granting or

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[25] See notes 12-17, *supra*.

[26] See S. Rep. No. 963, 75th Congress, 1st Session, p. 4 (1937); and see text and references at notes 12-14, *supra*. But see *California Water Service Co.* v. *City of Redding*, 304 U. S. 252 (1938), tailoring the construction of the 1937 Act toward the restrictive construction of the appeal provisions of the 1910 Act without any discussion of the 1913 Act and construction of its appeal provisions or of possible differences re appeals between the 1910 Act and the 1937 Act stemming from the absence in the 1937 Act of any need for an application for a temporary injunction in order for its three-judge requirement to come into operation.

denying, after notice and hearing, an *interlocutory* injunction"; the words "or permanent" were first added to the longer phrase over a quarter of a century later in 1937.[27] But for the phrase "after notice and hearing", the direct appeal provisions of the Acts of 1910 and 1913 might well have been read by the lawyers of that time as authorizing direct appeal even of interlocutory injunctions entered *ex parte*. The bench and bar of that time were aware of Congressional interest in providing curbs on the then prevalent use of *ex parte* injunctions,[28] and the professional conventions which would induce most lawyers of today to read the words *"interlocutory injunction"* as not including (by definition) a "temporary restraining order" entered *ex parte*, had not been crystalized as of 1910 or 1913.[29] Congress may well have inserted the phrase "after notice and hearing" to forestall the otherwise foreseeable contention that the new direct appeal authorizations encompassed the described injunctive orders, even when deliberated *ex parte*, and thus avoid disruption of the process of *expedited trial* and appellate court functioning which Congress had decided to provide.[30] (Congress had inserted other provisions into the Acts of 1910 and 1913 which it may well have judged to be as good or better safeguards, than a right of appeal, against improvident issuance of *ex parte* injunctions.)[31]

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[27] The Acts of 1910, 1913 and 1937 are fully reprinted in Appendix B of our alternative PETITION.

[28] See Judicial Code § 263 (1911) and its replacement, the Act of October 15, 1914, § 17, 38 Stat. 737.

[29] Compare the terminology of the Act of October 15, 1914, § 17, 38 Stat. 737, 28 U.S.C. § 321 (1946 ed.) with its cited predecessors and with the 1910 and 1913 Acts. Cf. Fed. R. Civ. P. 65.

[30] The Acts of 1910 and 1913 both include express requirements for expedited consideration on the trial and on the appellate levels. See PETITION, Apdx. B.

[31] The 1910 Act circumscribed single judge power to issue an *ex parte* restraint, and provided for expedited review by the full court of three judges. The 1913 Act authorized temporary injunctions only *after* three-judge *hearings*. See PETITION, Apdx. B. Compare note 13, *supra*.

Even if the conclusion in *Metropolitan Water*, (that only an order entered as a result of a hearing by three judges would be directly appealable), is determined to have been grounded upon a construction of the ambiguous phrase "after notice and hearing" and such a construction is judged to enjoy equal or greater historical support than the construction advanced above, nonetheless, loyalty to more essential features of the Court's construction of the *whole* statute in that decision precludes *present* adherence to that *particular conclusion* on proper forms of appellate proceedings. That procedural conclusion was reached in a proceeding for an extraordinary writ in which this court recognized a claim of a *legal right* to such a writ[32] made by a petitioner who had voluntarily asserted the view that it could *not* appeal[33] in the face of a contrary assertion by the single judge below,[34] reasserted

[32] If one has any doubt despite the quite clear wording of the opinion that this Court there recognized a *duty*, in the circumstances, to grant the writ prayed, (See 220 U. S. at 542 and 546), the matter is made even clearer by the Reply Brief for the Respondent, filed after oral argument on the rule to show cause; see especially pages 12-19. If this Court had believed it enjoyed discretion to grant or deny extraordinary relief in the circumstances, the showing of the respondent against a favorable exercise of the discretion, claimed to exist, was so strong that some statement in the opinion of counter-considerations supporting the Court's favorable exercise of discretion would almost certainly have been forthcoming.

[33] See Point III of both Briefs for the Petitioner.

[34] The single judge had said in his opinion in favor of an initial hearing by himself alone, (pursuant to a believed power in a single judge to *deny* injunctions by himself): "If after argument as to the validity or invalidity of the state statute, I shall reach the conclusion that the state statute is valid, then we shall have reached the end of the matter subject to a reversal or modification by the Appellate Court. And if I reach such conclusion, the restraining order heretofore issued will be vacated, and the interlocutory injunction denied. In that event the case can be carried to the Supreme Court, and if in the end the statute shall be overthrown, it would be done, by that Court, composed of nine Justices." See Brief for the Petitioner in support of its motion for leave to file at p. 34.

and documented in the extraordinary proceeding by the defendant's lawyer, acting as the respondent judge's counsel.[35] And, the opinion by Chief Judge White supporting the Court's granting of the claimed writ was grounded on a construction of the whole statute which recognized, and sought to secure, a plaintiff's *entitlement of right* to an expedited hearing at the trial level, by three judges, *and* on the appellate level, by this Court, when a plaintiff asserts a constitutional claim of the type described in the 1910 Act.[36]

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[35] See Reply Brief for the Respondent at pp. 19 *et seq.*

[36] "It is the hearing before the court thus constituted, also that is required to be expedited; and the appeal authorized by the section to be taken directly to this court 'from the order granting or denying, after notice and hearing, an interlocutory injunction' is manifestly an appeal from the expedited hearing had before the court consisting of three judges. We find no *expression* of or *implication* anywhere in the section *justifying the assumption* that there was an *intention* on the part of Congress that the *single* justice or *judge* to whom the application for the interlocutory injunction should be presented need *not* call to his assistance two other judges to pass upon the application *in the event* that *he* was of opinion that the *claim* of the unconstitutionality of the statutes *was untenable*. On the contrary, the statute evidences the purpose of Congress that the application for the interlocutory injunction should be heard before the enlarged court, whether the claim of unconstitutionality be or be not meritorious, *as the appeal allowed to this court is from an order denying* as well as from an order *granting* an injunction.

Congress having declared that the *merits* of the application for an interlocutory injunction, such as that applied for in the case with which we are concerned, should be considered and determined by a tribunal consisting of three judges constituted as provided in the act, it results that a tribunal not so constituted did *not possess jurisdiction over the subject-matter* of the right to such injunction. It follows, therefore, that in hearing and determining the application for the temporary injunction the single judge acted without jurisdiction, and that the order entered by him on March 6, 1911, vacating the restraining order theretofore issued and denying application for an injunction was void. *.* * we briefly advert to an insistence made in argument that we should now take jurisdiction of the merits of the case as made in the Circuit Court and determine whether or not the bill stated a case entitling to relief. Not being vested with original jurisdiction to pass upon the question of the validity of the Kansas statute, and

Over the years since *Metropolitan Water*, this Court has restrictively changed its general views and practices with respect to recognition of litigant "rights" to extraordinary writs in this and other situations.[37] And, this Court has restrictively redefined a plaintiff's right to a three-judge hearing in favor of single judge power to dispose of claims judged to be deficient jurisdictionally.[38] Given these changes, continued adherence to the particular conclusion in *Metropolitan Water* that a single judge order was not "appealable", has come to work a denial, rather than an assurance, of the expedited hearing *rights*, trial and appellate, conferred on plaintiff's who assert claims of the types described in these three judge-direct appeal statutes.

When continued adherence to a procedural holding operates to effect such a denial of the substantial hearing rights it originally secured, it is obviously time to reexamine whether the considerations on which that holding was grounded are *that* compelling. Given the opportunity for an alternative reading of "after notice and hearing" which would be historically meaningful and plausible, that ambiguous phrase cannot be read to compel a form-of-proceeding holding which now functions to effect a denial of statutory "rights" to be heard that were recognized in,

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the *petitioner being entitled as of right to have the controversy as to the constitutionality of the statute presented by its bill of complaint passed upon by a tribunal having such original jurisdiction*, it follows that we do *not possess a discretion to grant or refuse the writ*, dependent upon our conception as to whether the Kansas statutes is or is not constitutional", 220 U. S. at 545-6.

[37] Neither Revised Rule 30 (1954) nor this Court's modern practices in entertaining petitions for extraordinary writs in the present type of situation indicate that this situation is exceptional, falling outside the declaration of Rule 30 that issuance of any extraordinary is "not a matter of right". Compare text and references at note 47, *infra*.

[38] See text and references at note 57, *infra*.

and secured by, the whole decision of which that holding was a procedural incident.

(3). To guard against the contingency that the removal of the phrases "in such case" and "in such suit" and the historical and pragmatic considerations favoring a straight-forward reading of the phrase "after notice and hearing" may not suffice, by themselves, to educe a construction of Section 1253 under which rights to proceed by "appeal" depend only on the type of order and action (and hence on this Court's judgment whether a three-judge court was *legally required*), not also on whether or not three judges *actually functioned* on the trial level in the particular case, we are moved to direct attention to certain contextual considerations which lend further support for such a construction. The following considerations lend direct or indirect support to a construction of Section 1253 which will authorize direct "appeals", rather than require direct petitions for extraordinary writs, as the proper form for proceeding to attack orders of the types described in the Section, (whether or not *in fact* decided upon by three judges), so long as the action is one which is, or is claimed to be[39] *legally required* to be heard and determined on the trial level by a district court of three judges:

(a) The legislative history of the 1937 Act, from which the 1948 revision got its primary guidance[40] tends to reemphasize what Chief Justice White had led this Court to recognize in *Metropolitan Water, viz.*, that the Congressional majorities which enact three judge-direct appeal

[39] We have previously noted that claims that "actions" require three-judge determination divide into two classes and that this present appeal strictly *requires* a decision only as to a party right to assert one of those classes of claim by a direct appeal from single-judge orders. See text and footnote comment at note 4, *supra*.

[40] See note 14, *supra*.

statutes intend to *confer* special rights to be heard on persons who claim preventitive relief against legislative invasion of Constitutional rights,[41] as well to *guard* against risks of suspension or doom of legislative programs by improvident grants of temporary injunctions by single district judges.[42] Thus, before undertaking construction of the current set of uniformity-oriented, three judge-direct appeal Sections of revised Title 28, this Court must "hold in" or restrictively clarify the strict construction rule of *Phillips* v. *United States*, 312 U. S. 246 (1941); that rule was grounded on inferences concerning the Congressional intent behind three-judge statutes that can no longer be drawn. Construction of Section 1253 must be guided more by a rule of straight-forward construction, like that pursued for the 1913 Act, in *Ayrshire Collieries Corp.* v. *United States*, 331 U. S. 132 (1947), than by the rule of strict construction for the 1910 Act restated in *Phillips*.[43]

(b) The review practice thus far in this type of situation constitutes, in effect, an exceptional continuation, for

[41] The intent to confer rights of direct appeal and an intimation of the reason therefore is found in S. Rep. No. 963, 75th Congress, 1st Sess., p. 4. The matter is discussed at length in our alternative PETITION in Subcontention II, D, 2(d).

[42] The error in the decision of the single judge in *Metropolitan Water* resulted from a construction of the 1910 Act which was premised on an assumption that Congress intended *only* to guard against improvident injunctive intereference with legislative programs. See the parts of the single judge's opinion reprinted at pp. 32-4 of the Brief for the Petitioner in support of its motion for leave to file; and see pp. 1-3 of the Reply Brief for the Respondent. Compare *Phillips* v. *United States*, 312 U. S. 246 (1941), discussed in the text following this note.

[43] The unwarrantedly casual extension of this rule of strict construction to the 1937 Act in *California Water Service Co.* v. *City of Redding*, 304 U. S. 252 (1938) was touched upon in note 26, *supra*; and see text following note 56, *infra*.

which no special justification has been announced, of the otherwise superseded practice of permitting the opinions of single judges on issues pertaining to the jurisdiction of their superior courts to forestall party appeals to such a court so that it will be routinely deciding issues concerning its jurisdiction."

(c) The *Stratton* ruling on proper form of appellate proceeding makes *direct petitions* to this Court for *extraordinary* writs not only the *ordinary* but also the generally *exclusive* procedure, even in a *final* order situation like this,[5] for obtaining appellate review of single judge resolutions of issues concerning three-judge jurisdiction.[6] This ruling deviates so far from the premises of this Court's current attitude toward the use of extraordinary

[5] The reform of federal appellate practice away from a need to persuade a single judge to "allow" an appeal, capped by this Court's adoption of Revised Rule 10(d) (1954), is summarized in STERN AND GRESSMAN, SUPREME COURT PRACTICE 225 (Rev. ed. 1954). Compare *Ex parte Baker*, 274 U. S. 361, 362-4 (1926), *infra* 20, *supra*, with *United States v. Hamilton Distilling Co.*, 324 U. S. 774, 778 (1945). Allowance is a "ministerial act" despite timeliness issues. The matter is developed at greater length in our alternative Petition in Convention II at notes 14-16.

[6] Compare *Ex parte Metropolitan Water Co.*, 220 U. S. 539 (1911), where the District Judge had kept jurisdiction over the suit to permit hearing of further contentions, after independently denying an interlocutory injunction and the Constitutional contentions there [illegible]

[7] The exclusiveness of this Court's writ jurisdiction, and the complete preclusion of Court of Appeals jurisdiction over such issues even on appeals to those Courts from *final* judgments announced in *Stratton*, 282 U. S. at 15 [illegible] was altered to a minor extent by this Court's decision in *Ex parte Collett*, 337 U. S. 55, 68 (1951), to call for, on appeal, an expression of opinion on a special type of such issue, from the Court of Appeals for the District of Columbia. Many of the Courts of Appeals have since undertaken to ascend or ignore the exclusiveness announced in *Stratton*. Distinguishing *Stratton*, see *Hicks v. Southern Pacific Co.*, 231 F. 2d 130 (9th Cir. 1956), *cert. and* [illegible] 351 U. S. 985 (1956). Ignoring it, see, e.g. *Hicks v. Gates*, 253 F. 2d 868 (D. C. Cir. 1958), *cert. den.* 356 U. S. 978 (1958), and *Jay v. Tanner*, 250 F. 2d 611 (7th Cir. 1957).

writs[6] that if cries out for reconsideration and merits repudiation.[7]

(d) The *Stratton* rule calls for an expenditure of this Court's deliberate energies on Motions for leave to file Petitions which may well exceed the expenditure that would be required if the *issues*, commonly presented by challenges to single judge orders on three judge grounds, were presented on direct appeals.[8] And, instead of

[6] Revised Rule 30 (1954) and the cases cited therein, as well as *Re Petitions for Writs*, Rule 31 and 32, make it quite clear that this Court does not presently recognize any situation in which proceedings in this Court in error (whether writs will be entertained is a matter of routine for of right, see note 37, *supra*). For a more liberal, earlier view, see text and references at note 22, *supra*.

De facto practice with respect to the entertaining of Petitions and especially with respect to the granting of writs is to some if not more than the terms of the Rules lead one to expect. See the statistical summaries for recent periods set forth in 1951 Annual Rep. 114 (Table V) and 1958 id. at 211 (Table V).

A number of Justices have taken positions that *these* [illegible] for extraordinary writs belong in a distinct class subject to even greater discretion. See the dissenting opinions in *Ex parte Peru*, 318 U. S. 578, 590 and 605 (1943).

[7] See text immediately, and references in note 53, *supra*, and see the textual argument following note 38 *supra*. Compare the text and references in note 11 *supra* as to the impact on the extraordinary writ practices illustrated by *Ex parte Bakelite* [illegible] of Revised Rule 10(c).

[8] The [illegible] considerations supporting this superficially surprising suggestion are the fact that the issues commonly presented are of types, usually decided under principles of Constitutional contentions, that most of this Court's attention is but that are types ally susceptible of [illegible] by summary procedure, and the fact that presentation at [illegible] of these [illegible] professionally important questions would no longer be encouraged as at present by a practical need for parties to take out and for this Court to consider, with its full, multi judge opinions before, the "public importance" of a complete set of questions. *Cf. Federal Housing Administration* v. *The Darlington, Inc.*, 352 U. S. 977 (1957) (unanimous reversal in especially complex 3 judge issues presented by a direct appeal to the government, under S. 1252, from single judge decision).

An exploration of the whole question of proper form of appellate proceeding from the viewpoint of efficient judicial administration is set forth in our alternative PETITION in H. D. 5, commencing at note 70.

yielding the instructive, practice-improving, flow of meaningful precedents, which (typically summary) disposition of such direct appeals would yield[50], the present expenditure of energies, taking place in the modern context of attitudes and practices with respect to the granting of extraordinary writs[51], yields only a meaningless batch of dispositive orders.[52] And those decisions leave important areas of three-judge jurisdiction in a primitive state for long periods.[53] There is no adequate justification for continuing such a wasteful, confusing and unproductive practice when the wording of Section 1253 does not compel it.

(e) Direct appeals under 1253 in actions like this that are covered by Section 2282 provide the only instance of a basic right of appeal to this Court from decisions which *reject* Constitutional objections to *Congressional* statutes.[54]

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[50] The absence of a flow of memorandum decisions from this Court on questions with respect to the substantiality of Constitutional objections to *federal* statutes, comparable to the flow re *state* statutes under Section 1257(2), makes argument and deliberation of such issues of substantiality in the inferior federal courts dangerously speculative and the outcome decisions virtually untrustworthy as precedent; for the *substantiality* criterion to be applicated effectively and fairly by the inferior courts it must be applied with some regularity by this Court, especially after multiple changes in its membership over short periods of time.

[51] See note 47, *supra*.

[52] See 58 Col. L. Rev. 1080 (1958) speculating on the significance of *Hartsfield* v. *Sloan, U. S. District Judge*, 357 U. S. 916 (1958) (motion for leave to file denied; 4 dissents). And compare *Orleans Parish School Bd.* v. *Bush*, 351 U. S. 948 (1956) denying motion re single judge order *granting* injunction; order *affirmed* 242 F. 2d 156 (5th Cir. 1957), *cert. den.* 354 U. S. 921 (1957) with *Booker* v. *Tenn. Bd. of Ed.*, 351 U. S. 948 (1956) denying motion re single judge order *denying* relief; *rev'd.* 240 F. 2d 689 (6th Cir. 1957) *cert. den.* 353 U. S. 965 (1957). *Cf. Shuttlesworth* v. *Birmingham Bd. of Ed.*, 358 U. S. 101 (1958).

[53] See Question II presented by this appeal. See also the exchange between the (concurring) memorandum opinions in *Williams* v. *Simons*, 355 U. S. 49 (1957).

[54] Decisions which *reject* constitutional objections to state statutes come here under Section 1257(2) from the highest state courts as well as under Section 1253-2281.

Given the long history of rights of appeal to this Court, ultimately or directly, from such decisions, dating from 1789 to 1925 and the confused though negative disposition of the proposed amendment to the Judges Act designed to except such rights from its repeal provisions[55] restoration of such rights twelve years later in the Act of 1937, now over twenty years old, cannot cue any realistic fear of a flow of "casual" three-judge enactments, productive of an again unmanageable appellate docket, such as might justify restrictive construction of Section 1253. Congress has been repealing three judge-direct appeal statutes,[56] not enacting them, casually or otherwise.

For the current era, a balancing of this Court's responsibility to act so as to maintain a case load that is administerable judiciously and this Court's duty to follow the lead of valid Congressional enactments respecting its jurisdiction requires at least a straight-forward construction of the three judge-direct appeal statutes a la *Ayrshire Collieries*, (for I.C.C. cases), if not the liberal, purpose-riented construction of the direct appeal provisions (for Constitutional cases), of Section 2 of the Judicial Reform Act of 1937, now Section 1252, announced in *Fleming* v. *Rhodes*, 331 U. S. 100 (1947); while dissenting from the inclusive construction of what is now Section 1252, Mr. Justice Frankfurter directed attention to the propriety of a parallel construction of the two sections of the Act of 1937 that are now Sections 1252 and 1253. See 331 U. S. at 109.

Against the possibility that the above showing may be judged to satisfy the appellant's burden of showing the "substantiality" of its claimed right to "appeal", but that

[55] See FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 276-278, 285-6 (1928).

[56] See the Review Act of 1950, 64 Stat. 1129, 5 U.S.C. § 1031, et seq. (1952 ed.).

the Court may be left in some doubt whether the question raised by the claim is "so substantial" as to require resort to plenary procedures for its proper disposition, we ask the court to note, and to take into account here, the considerations, marshalled in Part I, B of our alternative Petition For Extraordinary Writs, to demonstrate the "public importance" of a plenary consideration and disposition of the whole question we have presented concerning the currently proper form of appellate proceeding for challenging orders, entered by single judges, which are claimed to have required determination by a court of three judges. That showing serves to provide contextual support for our ultimate *procedural* contention here, that this question concerning our right to proceed by "appeal" requires plenary consideration for its proper disposition.

Question II: Statutory Supersession of *Poresky* and *Redding*.

Any moderate regard for the expressed language of statutes and for supporting expressions of legislative intent precludes summary rejection of appellant's contention on Question II.

The holding in *Ex Parte Poresky*, 290 U. S. 30 (1933) that a single judge is to decide jurisdictional issues related to three-judge claims, by himself, was not grounded on any statutory language. Neither were the statements in the cases on which *Poresky* relies.[57] And, *Ex Parte Metropolitan Water Co.*, 220 U. S. 539 (1911), which did set forth and construe the pertinent statutory language, is in virtually direct conflict with the strict holding in *Poresky*

[57] The confused development is traced in details in our alternative PETITION in II, E.

that a single judge is to decide a substantiality type of jurisdictional issue.[58]

Thus, since the single judge authority established by *Poresky* is a judicial creation apparently emanating from a policy of holding in the use of three-judge courts and direct appeals,[59] it is impossible to point to a statutory supersession which takes the form of removal or replacement of its (nonexistent) statutory grounding.

We can, however, point to the following legislative enactments and history:

The House Judiciary Committee Report on the Kefauver Bill,[60] which was enacted as Section 3 of the Act of April 6, 1942, 68 Stat. 198, 28 U.S.C. §792 (1946 ed.)[61] noted that the Bill was supported by the Committee on Federal Legislation of The Bar Association of the City of New York,[62] as well as the American Bar Association which was the prime mover. The report of the N. Y. Bar Comm., which had been incorporated into the record of the House Committee hearing on the request of Congressman Kefauver,[63] said:

> • • • In providing that the single judge may not dismiss the action, the bill would overrule decisions holding that a single judge may dismiss an

[58] See the italicized part of the quotation from *Metropolitan Water* in note 36, *supra*. The court's use of the italicized word "untenable" is discussed, in light of the arguments presented to the Court in the briefs in our PETITION at II. C.

[59] See *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386, 391-2 (1934).

[60] H.R. 4812, "Further to Define the Power of A District Judge in Certain Suits", was favorably reported with only "clarifiatory" amendments in H. R. Rep. No. 1077, 77th Cong., 2nd Sess., p. 1.

[61] The complete legislative history and a more detailed presentation of the objectives of the Act and of its amendments is made in our PETITION in II. D. 2(a).

[62] H. R. Rep., *supra* note 60, at 2.

[63] Id. at 5.

action determinable by a three-judge court when the complaint shows on its face that the court lacks jurisdiction (Ex parte Poresky, 290 U. S. 30; 3 Moore, Federal Procedure, p. 3566). * * *[64]

Unfortunately, the language of the bill as finally enacted did not express its intended overruling of *Poresky* as well as did in its original form. The italicized word "such" in the critical clause of the Act, quoted in the margin below,[65] became ambiguous when the House Committee removed the bracketed word "district", as one of an integrated pair of "clarificatory" changes designed to *exclude* single District judges, not members of a three judge court; from *any* functioning on three judge actions.[66] However, the words used to clarify that point yielded an Act which did not effect as obvious and categorical a displacement of the single judge authority recognized in *Poresky* as had the original wording. And, this Court never found occasion to entertain a petition for an extraordinary writ and rule on the question of the impact on single judge power under *Poresky* of the 1942 Act before that Act was absorbed, as revised, into § 2284(5) of the 1948 revision of Title 28.

That subsection, and its companions, was taken by the Reviser from a draft bill and report of a special com-

[64] Ibid.

[65] "In any action in a district court wherein the action of three judges is required for the hearing and determination of an application for interlocutory injunction and for the final hearing * * * any [judge of the district] *one of such three judges* may perform all functions, conduct all proceedings, * * *, and enter all orders required or permitted by the Rules of Civil Procedure * * * provided *such* single [district] judge shall not * * * dismiss the action or enter a summary or final judgment on all or any part of the action: Provided, however, That any action of a single judge hereby permitted shall be subject to review at any time prior to final hearing by the court as constituted for final hearing, on application of any party or by order of such court on its motion".

[66] H. R. Rep., *supra*, note 60, at p. 7. See also pages 3 and 4.

mittee of the Judicial Conference.[67] The draft bill made "minor perfecting amendments" to the 1942 Act.[68] The Reviser further perfected subsection 2284(5) by removing the possibly confusing "such", which remained after the House Comm. amendment of the single District Judge dismissal bar of the Kefauver Bill as originally worded.[69] Thus, Subsection 2284(5) now inclusively and categorically provides:

> • • • A single judge shall not • • • dismiss the action, or enter a summary or final judgment • • •.

Equally important, the 1948 revision further closed down the "time" and "status" opportunities for a single District Judge to act on an action before it has become a three judge action or before he has become a member of a three judge court. The critical language includes (1) the references to Section 2284 that are included in the three basic sections which require applications for injunctions to be heard by three judges, viz, §§ 2281, 2282, and 2325 and (2) the terms of Subsection 2284(1).[70] Also supportive of a conclusion against any final dismissal by a single judge is the provision in 2284(5) for review by

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[67] See paragraph six of Reviser's Note to Section 2284:

> This revised section represents an effort to provide a uniform method of invoking three-judge district courts, and for procedure therein. It follows recommendations of a committee appointed by the Judicial Conference of the United States, composed of Circuit Judges Evan A. Evans, Kimbrough, Stone, Orie L. Phillips and Albert B. Maris.

[68] Jud. Conf. U. S., Rep. of Comm. On Uniform Procedure For Convening District Courts of Three Judges, Appendix A, p. 11 (October 3, 1944).

[69] See Note 65, *supra*.

[70] A detailed presentation of these points is made in our Petition in Part II, C. See also Part II, E, note 110 *et seq.*

the full court of (any) action by a single judge in a three-judge action.[71]

And, in any event, the weight of this showing on legislative supersession seem clearly to be too great for summary rejection; plenary consideration of, and opinion-writing attention to the "new" legislation, now a decade old, would seem to be in order. Following the Court of Appeals for the Fourth Circuit in *Jacobs* v. *Tawes*, 250 F. 2d. 611 (1957) Chief Judge Prettyman concluded, denying our application for designation of a full court to hear a motion for a review of the single judge's action that the introductory language of Section 2284 leaves room to save *Poresky*. This conclusion completely ignores the express

[71] The Reviser departed from the 1942 Bill and Act and the draft bill of the Committee of the Judicial Conference and removed from the provision for review by a full court of single judge action, as it now appears in Subsection 2284(5), the formerly limiting phrase "hereby permitted." Invoking 2284(5), appellant attempted, unsuccessfully, to secure review by a full court of the single judge dismissal before it undertook to initiate the present appeal. See THE INITIAL SHOWING OF JURISDICTION; *supra*, and the STATEMENT OF THE CASE in the sentences preceding note 5, *supra*.

If this Court were to conclude that a single judge may not any longer order a dismissal and that a full court should hereafter pass on dismissal issues in all three judge actions, (in which a single judge suggestion of a lack of jurisdiction fails to cue an amendment or a withdrawal of the Complaint), before an appeal to this Court, it would appear proper for disposition of this appeal to take the form of a reversal with a remand for three-judge processing of the dismissal issues in this case. However, the major dismissal contention below and the single ground on which the order below was based, is so insubstantial, as shown in our next presentation on Question III, that a remand to permit its redetermination below will serve no real purpose. Similarly, unless some alternative dismissal contention is judged to raise a substantial question, despite the showing made hereafter in our presentation of Question IV, any remand should, compatibly with the goals of modern procedure stated in Rule 1, Fed. Rules, Civ. Proc. direct the three-judge court below to proceed to hear plaintiff's motion for a summary judgment or for a "directive order" under Rule 56(d). Cf. *Smith* v. *Sperling*, 354 U. S. 91 (1957). Generally, see 2 MOORE, FEDERAL PRACTICE, Par. 12.16 at note 8 (2nd. ed. 1948); Compare note 5 *supra*; and see the facts set forth in contention IV, A of Petition for Writs of Mandamus.

tie between the reference to Section 2284 in the several "requirement" sections, including 2282, and the terms of 2284(1) as well as the more obvious and Reviser-intended function of the introductory language.[72] This strained conclusion by a strong judge, who recognized the "novelty" and "difficulty" of the questions we have raised, suggests that only this Court can presently bear the burden of its now time-hallowed precedents well enough for the question whether their ruling has been superseded by the subsequent legislation to be freely explored.[73]

Question III: The Impact of Section 1583 on Section 1331.

If Questions I and II did not seem to require plenary consideration, appellant would suggest the propriety of a summary reversal of the judgment of dismissal because of the error below which cued Question III. The defendant's contention, sustained by the judgment below, that Section 1583 wholly divests the District Courts of their long-standing jurisdiction, now provided by Section 1331, over actions arising under the Constitution is probably insubstantial, clearly erroneous.

First, such a contention flies in the face of all the precedent against reading other statutes as operating to

[72] These points and the further deficiencies of those opinions are developed at length in our PETITION in Part II. Included there is discussion of the alternative holding, apparently favorable to our position, in *Snyder's Drug Stores* v. *Taylor*, 227 F. 2d. 162, 165 (8th Cir. 1955) which we presented to Chief Judge Prettyman but which he did not distinguish or cite. Compare *Aaron* v. *Cooper*, 261 F. 2d. 97, 105-107 (8th Cir. 1958).

[73] The weighted form of question that Chief Judge Prettyman found it appropriate to investigate is highlighted and commented upon in our PETITION in Part II, A at note 38. Cf. *Browder* v. *Gayle*, 142 F. Supp. 707, 716-717 especially at note 14 and, in the dissent, at p. 718 n. 2, (M.D. Ala. 1956) *aff'd.* 352 U. S. 903 (1956).

effect implicit restrictions of jurisdiction vested in the District Courts by the sections of the Judicial Code.[74] Moreover, the same Reviser and Congress that provided Sections 1583 and 1331 also provided 1340 with its express provision that District Court jurisdiction over actions arising under the customs-revenue Acts is to stop short of "matters" within the jurisdiction of the Customs Court.[75] This provided, the absence of any similar exception to District Court jurisdiction under 1331, is clear manifestation that the enacting Congress, aware of prevalent construction practice against implicit divestment of District Court jurisdiction and knowing how to provide for divestment when it wanted to, didn't want to do so with respect to constitutional actions, with a customs background, embraced by Section 1331.[76]

The only precedent that lends any color of substantiality to the reading of Section 1583 that was urged on, and adopted by, the District Court is the case of *Horton* v. *Humphrey*, 146 F. Supp. 819 (D.D.C. 1956) *aff'd.*, 352 U. S. 921 (1956). But this Courts memorandum affirmance, without any citation of authority, should not be read as holding that the District Courts have been divested of jurisdiction over actions, arising under the Constitution, which assert constitutional contentions susceptible of resolution by the Customs Courts.

First, although the District Court's dismissal, affirmed by this Court, was grounded on a holding that the exclusive jurisdiction of the customs courts under 1583 *does preclude* District Court jurisdiction even over actions

[74] A number of pertinent precedents are cited in our PETITION in III, C, 4; see, e.g., *Harmon* v. *Brucker*, 355 U. S. 579 (1958).

[75] Section 1340 is reprinted in Apdx. B of our PETITION.

[76] The whole matter of a properly integrated construction of Sections 1331, 1340 and 1583 is developed in our PETITION in Contentions III, C, 1-4 and IV.

claiming injunctive relief for Constitutional rights, that holding was qualified by the facts that there had been no prior resort to the Customs Court and by the court's recognition that:

> • • • Thus in import duty matters, if the jurisdiction of the Customs Court and the Court of Customs and Patent Appeals is exclusive, there may be no way to obtain the equitable relief in situations of extreme hardship which the Supreme Court has occasionally permitted in internal revenue cases despite the statute flatly prohibiting injunctions in tax matters. *E.g.*, Miller *v.* Standard Nut Margarine Co. of Florida, 1932, 284 U. S. 498, 52 S. Ct. 260, 76 L. Ed. 422; Hill *v.* Wallace, 1922, 259 U. S. 44, 42 S. Ct. 453, 66 L. Ed. 822. Since the threat of imposition of the dumping duty is alleged by the complaint to have forced plaintiffs out of the business of importing the type of pipe involved, the case might—as an original proposition—fall within the exceptions the Supreme Court has carved in this statute, even though (as we have noted) plaintiffs would not have to pay the additional duty until they had exhausted their remedy in the Customs Court and in the Court of Customs and Patent Appeals. But we think it is too clearly established that those courts provide an adequate and exclusive remedy in this sort of case for us to make an exception here.[77]

Thus, even the District Court's decision may not strictly hold that there has been a complete removal of District Court jurisdiction, only that an exception would not be made in a case of the "sort" at hand. We did not attempt to bring this action within the *Margarine* rule in favor of exceptional injunctions against the collection of taxes; the taxes here were paid long ago. This action was formulated so as to allege extraordinary justification for

[77] 146 F. Supp. at 821.

exercise of 1331 jurisdiction to afford injunctive relief of a less drastic form, not disruptive of revenue-*collection*.

Second, this Court's memorandum affirmance of the dismissal below probably did not constitute, on the part of many of the participating Justices, an affirmance of the legal conclusions, as well as the order, below, but rather a vote in favor of the judgment of dismissal because of the plaintiff's inadequately justified failure to resort to and exhaust the primary jurisdiction. This interpretation of the memorandum decision is compelled by the following consideration:

The memorandum decision in *Horton* was this Court's response to the motion to summarily affirm or to dismiss that was filed by the government attorneys, (including Appellee Doub), who represented Secretary Humphrey on the direct appeal to this Court in that case by the plaintiff-appellant. The brief in support of that motion departed from the announced jurisdictional grounds of the judgment of dismissal in the District Court and, invoking *Aircraft & Diesel Corporation* v. *Hirsch*, 331 U. S. 752 (1957), emphasized Horton's unjustified failure to resort to and exhaust the primary jurisdiction of the Customs Courts. See Appellee's Motion to Affirm or Dismiss at pp. 6-7. Moreover, this Court's response to the direct appeal of the dismissed plaintiff was not a dismissal of the appeal but rather a granting of appellee's alternative motion to affirm the decision appealed. The probable meaning of that choice is quite clear. The three-judges below had, after erroneously concluding that the "exclusive jurisdiction" of the Customs Court precluded the *existence* of overlapping District Court jurisdiction, directed the entry of the final judgment just by the single judge to whom the complaint had been first presented. That action provided a basis for an appellee contention, on the authority of *Oklahoma*

Gas & Electric Co. v. *Oklahoma Packing Co.* and *Ex parte Poresky, supra* note 1, that the judgment appealed was not a judgment in an action requiring three judge processing, was thus not directly appealable to the Supreme Court, and so should be *dismissed*. The appellee made that contention in support of the dismissal alternative of its motion, citing *Oklahoma Gas* and *Ex parte Poresky, supra*. See Appellee's Motion to Affirm or Dismiss at pp. 7-8, n. 6. The memorandum decision to affirm, rather than to dismiss, implicitly rejected that contention. This implies (1) that the action was within the jurisdiction of a three-judge court, as well as within District Court jurisdiction and thus within the jurisdiction of this Court over direct appeals, so that the appeal should not be dismissed but (2) that the dismissal of the action below was correct on the remedial, rather than jurisdictional, ground that the Complainant had failed to resort to and exhaust the primary jurisdiction.

The over-reading of this Court's memorandum decision in *Horton*, which took place below in this case, shows a present need for an opinion that will clarify that memorandum decision and expressly state this Court's view on the real effect of Section 1583 on the existence and exercise of District Court jurisdiction under 1331. Thus, even though the position that 1583 wholly divests the District Court of jurisdiction over every action arising under the Constitutional that has a customs background should be judged insubstantial, the question of the real relation between sections 1583 and 1331 does seem to merit plenary disposition. This observation leads us into Question IV.

Question IV: Affirmance on other Grounds; "Primary Jurisdiction", etc.

As pointed out in the Statement of the Case, Question IV encompasses questions of "primary jurisdiction" and

other questions of remedial law that were raised below by that ground of defendant's Motion to Dismiss which attacked the complaint for failure to state a claim on which relief may be granted, as well as by plaintiff's counter-motion for summary judgment. Judge McGarraghy did not reach these issues. However, some of the contentions against exercise of jurisdiction, if sustained here, would provide a basis for affirming the dismissal below "on other grounds".[78] And, these quasi-jurisdictional, remedial points might be raised by this Court itself, even if not asserted as contentions by the appellees. Thus, to anticipate and avoid the possibility of a summary affirmance on other grounds, appellant is moved to show here in this Jurisdictional Statement that its positions are so weighty that a *summary* affirmance on such grounds would not be proper.

1. Our central point on the operation of the doctrine of primary jurisdiction (which we admit is brought into operation by Section 1583) can readily be stated and be shown to be weighty.

Where, as here, there has been a resort to and an exhaustion of the primary jurisdiction of an agency or court, that does not enjoy authority to reject federal Constitutional objections with ultimate finality, which yielded outcome decisions, that reached but *rejected* the constitutional objections advanced, and 'review' by this Court could not be obtained, then the remedial bar which prevented earlier exercise of District Court jurisdiction over an action presenting those constitutional issues ceases to be operative. See *Aircraft & Diesel Equipment Corp.*, 331 U. S. 752, 764, 773-4 (1947). And see *Morey v. Doud*, 354 U. S. 459, 460, 470 (1957). Cf. *Urie v. Thompson*, 337 U. S. 163, 171-73 (1949). Compare *Stefa-*

[78] Cf. *Horton v. Humphrey*, *supra* in the text.

nelli v. Minard, 342 U. S. 117 (1951) with *Darr v. Burford*, 339 U. S. 200 (1950) and *Brown v. Allen*, 344 U. S. 443 (1953). Cf. *Alabama Public Service Comm'n v. Southern Ry.*, 341 U. S. 341, 348-9 (1951), where this Court established a *permanent* bar to exercise of the jurisdiction of a district court of three judges, pursuant to Section 2281 and both Constitutional question and diversity jurisdiction, only after pointing to the complainant's alternative *right*, after exhaustion of the administrative and judicial processes of the state, to an ultimate hearing on any ripened and rejected federal constitutional objections in this Court. Compare *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 223, 228, 238-9 (1908).

The fact that primary jurisdiction was exhausted in *connected* cases rather than in the immediate case is no obstacle to exercise of the District Court's jurisdiction over the immediate case because the results in those connected cases show that the *ordinarily* adequate and primary remedy has become so onerous, hazardous and improbable as to have become "inadequate" and thus no longer worthy of exhaustion. Generally, see *Chicago v. Atchison T. & S. F. R. Co.*, 357 U. S. 77, 85 (1958) and the concurring opinion of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U. S. 123, 156 (1951). More specifically see *Morey v. Doud*, 354 U. S. 457 (1957) noting the prior processing of the tendered issues by the Illinois Supreme Court, in a different case. See 354 U. S. at p. 460, note 3 and p. 470, note 16.

2. The allegations in the Complaint set forth a foundation for the injunctive relief prayed therein which is legally sufficient on any one of several grounds. These alternative grounds are quite fully developed in Contention IV. C of the companion Petition for Writs of Mandamus. Here it should be appropriate and sufficient to respectfully direct attention to the following:

(a) The action dismissed below sought injunctive relief to secure Constitutional rights. "And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution * * *". See *Bell* v. *Hood*, 327 U. S. 678, 684 (1946).

(b) Among special remedial rules, barring injunctions, which operate near to, but not upon, this action, neither the Congressional preclusion of declaratory judgments "with respect to federal taxes" (28 U.S.C.A. § 2201) nor the bar to "suits restraining the assessment or collection of any tax" (26 U.S.C.A. § 7421) is applicable to this action. The taxes against plaintiff have already been assessed and collected. The Complaint does not include any prayer for a declaratory judgment.

(c) If there must be a satisfaction of traditional precedent on "inadequate remedy at law" and "irreparable injury", then the present showing of the probable nonrecognition of plaintiff's substantive constitutional rights in the Customs Court must be judged on precedent as satisfying the demands of "irreparable injury" as they have been applied in this customs field. See *Waite* v. *Macy*, 246 U. S. 606 (1918). And an importer is not allowed interest on refunds of excessive duties that are held to have been erroneously taken from him under protest, while *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 778 n. 32 (1957) suggests that the lack of such a right to interest in similar circumstances would have constituted "irreparable injury".

3. Our ultimate comprehensive contention against recognition by this Court of any remedial ground for affirming the dismissal below—whether such recognition were to come on summary or even on plenary consideration of

this question—is that such recognition of a bar to exercise of the District Court's jurisdiction over the present action would precipitate a serious Constitutional question, about the legal rule that compelled judicial recognition of such a bar, which should, if possible, be avoided. The weightiness of this ultimate remedial contention critically depends upon the weightiness of our Constitutional objection to any absolute barring of District Court adjudication of an action like appellant's. With this, we are ready to turn to Question V.

Question V: The Rights to Process Conferred by Article III and The Due Process Clause.

In our Statement of the Case we carefully set forth the way in which plaintiff articulated and asserted the special "right to be heard" which plaintiff-appellant has claimed. We also set forth there the way in which the judgment below constitutes a rejection of that claim. Before proceeding to show why that claim is too substantial to be summarily rejected by this Court, we must pause to spell out the narrowness of the claimed right to be heard which we have been and are asserting.

1. Appellant cannot document and has not claimed a *categorical* right under Article III and Due Process to be heard in the District Court on its substantial claim of "substantive or primary" Constitutional right.[79] Eastern

[79] The adjectives "substantive or primary" are used to distinguish and put aside the type of historically complicated question present in *Burns* v. *Wilson*, 346 U. S. 137 (1953), *rehearing denied*, over dissenting opinion, 346 U. S. 844 (1953); and see *Brown* v. *Allen*, 344 U. S. 443, 499 (1953). For there to be *recognition* of a right to be heard in some Article III Court on a claim for relief from an alleged *invasion* by an adjudicatory tribunal (called *a "court"*) which enjoyed "jurisdiction" of a "procedural" right alleged to be conferred on the party by the Constitution, this Court must re-examine ancient postulates about proper relations among tribunals

States asserts only a *conditional* (but here operative) right to be heard in the District Court. This importer-taxpayer must be heard in the District Court on its Constitutional claim only because it can't demand a hearing, by right, from this Court, on that claim, after the final adverse decision that is now certain if it proceeds on in the Court of Customs and Patent Appeals or after final judgment in any presently conceivable action in some state court[80] and because it isn't afforded a right, analogous to income-tax-payers, to go from its specialized Court to an Article III, Court of Appeals.[81]

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and the absence of party rights to "appeal"-type review except as such rights are conferred by statute. See PETITION at V, A, 3.

The word "primary" was used along with "substantive" because, while "substantive" readily distinguishes "procedural," "substantive" is not so obviously appropriate a label for the Constitutional rights sought to be asserted, for protection by an Article III court, by plaintiff-appellant's action. "Substantive or primary" should serve to distinguish "procedural" *and* to *describe* and label an importer's right to be free of exactions not enacted by Congress or determined pursuant to Congressional directions.

[80] The majority opinion in *Cary* v. *Curtis*, 3 How. 236 (44 U. S. 1845), expressly pointed to the availability of state court jurisdiction with right of appeal to this court thereafter as an alternative process open to an importer for asserting a claim against a collector before it concluded that an amendment to the customs statutes had deprived importers of their former right to bring an action against the collector in the federal courts for money unlawfully withheld. This was the context and the occasion for the majority's famous acknowledgment, over the dissents of Justices Story and McLean, of the complete authority of Congress over the jurisdiction of the inferior federal courts.

Even if some state court would still enjoy jurisdiction over some action asserting the primary Constitutional right claimed by appellant, present statutes no longer provide for review, of right, by this Court of an adverse final decision of the Constitutional question by the highest court in that state. See 28 U.S.C. § 1257.

[81] Congressional liberality in providing both an alternative right of resort to a District Court and a right to Court of Appeals review of the Tax Court, (the court specialized to adjudication of claims under the internal revenue laws), lends collateral support for the greatest scepticism whether Congress intended to precipitate the present Question by denying importer-taxpayers *any* resort, of right,

In other words, we claim and will document only a right to be heard in *some* Article III court, appellate or trial; we, of course, acknowledge that Congress enjoys authority to define the jurisdiction of each type of Article III court, considered separately; but, we deny that those lines of Congressional authority can be simultaneously exercised to so limit the jurisdiction of *all* those Courts that appellant-petitioner is denied a right to resort *to any of them* for a hearing on the merits of its substantive constitutional claim.

The implementing right, under Article III and the Due Process Clause to be heard in *some* Article III court, before an ultimately final decision rejecting a ripe and substantial claim of substantive or primary Constitutional right, which we claim, is narrower and concedes greater legislative control over rights to process, through control over court jurisdiction, than did most of the rights to process that are recognized or presupposed by the majority opinions in all the following cases. Virtually all the dissenting or concurring opinions in these cases also recognize, or do not reject, the minimum right we claim; some are cited:

> *Martin* v. *Hunter's Lessee*, 1 Wheat 304, 347-9, 380-2 (14 U. S. 1816); *Cohens* v. *Virginia*, 6 Wheat. 264, 383-4, 387, 388, 391, 402-4 (19 U. S. 1821); *Reagan* v. *Farmer's Loan & Trust Co.*, 154 U. S. 362, 391, 399 (1894); *Smith* v. *Reeves*, 178 U. S. 436, 445 (1900); *General Oil Co.* v. *Crain* 209 U. S. 211, 226-8 (1908); *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 223, 228, 238-9 (1908); *Ng Fung Ho* v. *White*, 259 U. S. 276, 284-5 (1922); *Lipke* v. *Lederer*, 259 U. S. 557, 562, 564-5 (1922); *Fidelity National Bank & Trust Co.* v. *Swope*, 274 U. S. 123,

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to some Article III court's jurisdiction over actions asserting Constitutional objections to laws providing for customs-revenue. But the decision of the Court below makes it necessary for appellant to present this question to this Court.

130-1 (1927); *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 431 (1931); *Phillips* v. *Comm'r. of Internal Revenue*, 283 U. S. 589, 596-9 (1931); *Miller* v. *Standard Nut Margerine Co.*, 284 U. S. 498, 510 (1932); *Crowell* v. *Benson*, 285 U. S. 22, 60, 86-8 (1932); *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 51-2, 77, 84 (1936); *Stark* v. *Wickard*, 321 U. S. 288, 307-8, 310, 314-5 (1944); *Estep* v. *United States*, 327 U. S. 114, 123-5, 126-8, 132-3, 141-2 (1946); *Angel* v. *Bullington*, 330 U. S. 183, 187-190, 193, 211 (1947); *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U. S. 752, 775-6 (1947); *Alabama Public Service Comm'n* v. *Southern Ry.*, 341 U. S. 341, 348-9 (1951); *Georgia R. R. & Banking Co.* v. *Redwine*, 342 U. S. 299, 304-6 (1952); *Doremus* v. *Bd. of Education*, 342 U. S. 429, 434 (1952); *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 13-17, 31 (1955); *Battaglia* v. *General Motors Corp.*, 169 F. 2d. 254, 257 (2nd. Cir. 1948) *cert. den.* 335 U. S. 887 (1948); *Eisentrager* v. *Forrestal*, 174 F. 2d. 961, 965-6 (D. C. Cir. 1949) *rev'd on other grounds sub nom. Johnson* v. *Eisentrager*, 339 U. S. 763 (1950).

The implementing right, established by the aforecited cases, to resort to some Article III court for a hearing, of right, before an ultimately final rejection of a ripened and substantial, primary constitutional claim, has been blurred by not uncommon over-reading of opinions which reject broader claims of rights to be heard in some one of the Article III courts and, while doing so, remind us of Congressional control over the jurisdiction of the various federal courts. Especially noteworthy among these commonly over-read opinions are *Cary* v. *Curtis*, 3 How. 236 (44 U. S. 1845); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (59 U. S. 1856); *Ex parte McCardle*, 7 Wall. 506 (74 U. S. 1869).

2. In our alternative Petition for Writs of Mandamus we have undertaken a detailed synthesis of these apparently conflicting lines of authority.[82] Here it should be sufficient to direct attention to this Court's recent decisions in *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955) and in *Reid* v. *Covert*, 354 U. S. 1 (1957). The opinions in these cases should put an end to further reading of the provisions in Articles I and III which authorize Congressional control over Court jurisdiction out of their context of surrounding Constitutional provisions. With these opinions this Court seem at last to have made clear once again that the large measure of political discretion that Congress enjoys, despite the Constitutional separation of powers, to use, or to exclude, Article III courts from the adjudication of "matters involving public rights", (that would be susceptible to Article III adjudication), must not be so exercised as to encroach on the process rights of individuals which are secured to them by Article III and the various "process" and "procedural" provisions of the Bill of Rights. Article I powers, as supplemented by the Necessary and Proper Clause, cannot be so exercised as to provide an adjudicatory process in an Article I tribunal or court which encroaches on constitutional rights to be heard in an Article III court.

Both these decisions recognized rights to adjudicate some kinds of controversies and issues, with the government under public laws, through proceedings in Article III courts of "independent" judges and with the benefit of any special procedures required by the Bill of Rights. Both decisions strike down inconsistent enactments.

Here, appellant does not complain of the tenure "independence" of the judges of the Customs Court nor has it demanded a right to elect to structure its controversy into

[82] See Contention V. B.

a type of action against either the offending customs officer, or the government; in which it will enjoy a right to jury trial, such as other taxpayers still enjoy, and as importers once enjoyed. See *Cary* v. *Curtis*, 3 How. 236, 350 (U. S. 1845). Appellant-petitioner has only demanded a right to be subjected to an ultimately final adverse adjudication of our basic Constitutional contention by some court of Article III judges, not of Article I judges selected for, and conditioned by experience to, competence in a specialized substantive field. Compare *Toth*, *supra*, 350 U. S. at pp. 18-19, note 14. See also 1 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION, 63-70 (1931) noting especially, (from p. 63 note 68), the provisions governing selection of new judges for, and length of assignment of new and old judges to, the Commerce Court and the related references provided by Sharfman to pertinent legislative history.

3. This last point brings us to a subquestion here concerning the status, re Article I or Article III, of the Court of Customs and Patent Appeals. Our ultimate contention here under Question V includes a subcontention that that Court remains an Article I court, as it was held to be in *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929), despite Section 1 of the Act of August 25, 1958, 72 Stat. 848, amending 28 U.S.C. § 211, which *declared* the Court of Customs and Patent Appeals to be an Article III court. It is our contention that said Act is constitutionally ineffective to "establish" or "constitute" that Court as an Article III Court. It should suffice to show the substantiality of our contention to point out that this Court held in *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929) that the manifested or declared intention of Congress on the issue whether it meant to be exercising its power under Article III or its power under Article I when creating a tribunal does not

determine whether or not the tribunal created is an Article III court or an Article I court.[83]

The really determinative factors on Article III or Article I status for a Congressionally created court are the terms and provisions of all the congressional statutes by which the court is established, manned and empowered. On the importance of its powers and functions, see *Bakelite, supra; Williams* v. *United States,* 289 U. S. 553 (1933) and *McBride* v. *Teeple,* 311 U. S. 649 (1940). On the importance of how the tribunal is manned, see *Toth, supra;* and see *Cohens* v. *Virginia,* 6 Wheat 264, 387 (19 U. S. 1821). See also Sharfman, *op. cit. supra.* An assessment of these factors adequate to properly resolve this issue of Art. III or Art. I status for the Court of Customs and Patent Appeals clearly requires resort to plenary procedure.

4. Appellant recognizes that this Court could conclude against District Court authority to adjudicate its complaint and still refuse to decide our Due Process—Article III contention at this time. Such a refusal is conceivable

[83] Although this Court did not use such an analogy when discussing this question of Congressional intent, we suggest that the situation with respect to Congressional control over a question of Article III or Article I status is analogous to that with respect to Congressional control over whether a law shall be "criminal" or "civil". If Congress provides a law which has incidents or characteristics such that the law must be deemed "criminal", a Congressional desire to provide those incidents, but to have the law deemed to be "civil" so as to "avoid" judicial recognition of an invasion of rights, secured to persons by the Constitution, with respect to the administration of, or to the adjudicatory process under, "criminal" laws, cannot be given effect. Comparably, when Congress provides for a court that has incidents or characteristics such that the Court cannot be deemed to be an Article III court, no effect can be given to a Congressional desire to provide those incidents but to have the court judicially deemed to be an Article III court so as to "avoid" recognition of an invasion of rights, secured to individuals by the Constitution, with respect to resort to some Article III court for adjudication of certain types of claims.

if this Court finds itself free, and willing, to adopt the position that our claimed right under Article III and Due Process will not be inevitably in issue and ripe for decision until after the doors of the District Court have been held to be closed and after an effort on our part to then resort to this Court, "of right", from the Court of Customs and Patent Appeals, for a hearing here on the merits of our basic constitutional contention is opposed by the Executive. Though conceivable, such a position is not really tenable: (a) opposition or objection by the adversary party is not necessary to the raising of the jurisdictional issue that would be inherent in such an "appeal" effort on our part: and (b) such a position would be infected with the vice of requiring a party to navigate a possibly trap-ridden course of procedure under pertinent Rules in order to assert a "right" to "appeal", conferred by Article III and Due Process, in a type of situation where the Congressional statute regulating resort to this court authorizes only a petition for certiorari under Section 1256 and seems to preclude an appeal.

Moreover, if we are wrong, and such a position *re* present unripeness of the presented question is not untenable, this Court should not willingly adopt it. In the first place, adoption of a position that our claim under Article III and Due Process is not now fully ripe for decision would operate to bring all cases in which a claim, like ours, is made, to this court in the first instance; that practice would deny this Court the benefit of prior evaluation of a contention of this type by the lower courts, deliberating upon the contention as asserted with respect to the *alternative* right of resort to a District Court which is an included element of a claim like ours. In the second place, the certiorari statute, Section 1256, applicable here, is clearly constitutional on its face, when viewed in light of

precedents. And, there is no justification for putting it, or similar, neighboring, certiorari statutes, in constitutional doubt by raising and opening up latent questions about their complete constitutionality in all situations. Such a great price is not worth paying merely to avoid a present decision of the precedentially much more open type of question that is presented as a live issue in this case in its present posture, where the District Court alternative of our claim has been summarily rejected below.

Conclusion

On the basis of the substantiality of the showing with respect to proper construction of 28 U.S.C. § 1253 made under Question I, we submit that a summary dismissal of this appeal would not be proper. We further submit that a summary affirmance of the judgment of dismissal below would not be justified because of the weightiness of our showing in this Statement in support of our contentions on the other four questions, about the soundness of that judgment, which we have presented by this appeal. Thus, we finally submit that the least favorable order that will be appropriate, after consideration of this Jurisdictional Statement and of any motion filed in response hereto, will be an order providing for plenary consideration of the case and postponing consideration of the question of jurisdiction. We pray any more favorable order that the Court may judge to be appropriate and just.

Respectfully submitted,

GERARD R. MORAN,
Counsel for Plaintiff-Appellant,
Rutgers Law School,
Newark, New Jersey.

Appendix—Opinions and Orders Below

United States District Court

FOR THE DISTRICT OF COLUMBIA

CIVIL NO. 1402-58

EASTERN STATES PETROLEUM CORP.,
Plaintiff,

v.

WILLIAM P. ROGERS, *et al.*,
Defendants.

MEMORANDUM

The Court is of the opinion that the cause of action alleged in the complaint is one that falls within the exclusive jurisdiction of the Customs Court under the provisions of Title 28 U.S.C.A., Sec. 1583. Since this Court is wholly without jurisdiction, it is not necessary to convene a three-judge court to pass on that question but action may be taken by a single judge. *Jacobs* v. *Tawes*, 250 F. 2d 611.

The defendant's motion to dismiss will be granted for want of jurisdiction.

Counsel for defendants will submit an appropriate Order.

/s/ JOSEPH C. MCGARRAGHY
Judge

November 25, 1958.

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Order

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 1402-58

EASTERN STATES PETROLEUM CORP., *Plaintiff,*

vs.

WILLIAM P. ROGERS, *et al.*, *Defendants.*

Upon consideration of application by the plaintiff for the convening of a statutory Court of three Judges and upon consideration of the motion of defendants to dismiss the complaint and points and authorities in support of and in opposition to the said motion and the said application and after argument in open court, it is by the Court this 10th day of December, 1958,

ORDERED that the application by the plaintiff for the convening of a statutory Court of three Judges be and the same is hereby denied, and it is

FURTHER ORDERED that the motion of defendants to dismiss the complaint on the ground that the Court lacks jurisdiction over the subject matter of the cause be and the same is hereby granted and the complaint be and the same hereby is dismissed.

/s/ JOSEPH C. MCGARRAGHY
Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1191 September Term, 1958

EASTERN STATES PETROLEUM CORPORATION (a corporation of the State of Delaware),

Petitioner,

v.

WILLIAM P. ROGERS, Attorney General of the United States, *et al.*,

Respondents.

Before: Prettyman, Chief Judge of the District of Columbia Circuit.

ORDER

This case came on for consideration on petitioner's "Motion for leave to file an Application for an Order designating two Judges to complete the full District Court of Three Judges to hear Motion for Review," and said motion was argued by counsel.

Upon consideration whereof, it is ORDERED that the aforesaid petitioner's motion is denied.

Dated: January 8, 1959

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 1191

EASTERN STATES PETROLEUM CORPORATION, a Corporation of the State of Delaware, PETITIONER

v.

WILLIAM P. ROGERS, Attorney General of the United States, et al., RESPONDENTS

On Motion for Leave to File an Application to the Chief Judge of the Circuit for an Order Designating Two Judges to Complete the Full District Court of Three Judges to Hear Motion for Review

Memorandum

(Based Upon an Oral Statement Made in Open Court January 7, 1959, Upon Conclusion of the Oral Argument of Counsel)

Filed February 5, 1959

Mr. Gerard R. Moran, of the bar of the Supreme Court of Virginia, *pro hac vice*, by special leave of Court, for [2] petitioner. *Mr. Edwin G. Martin* also entered an appearance for petitioner.

Memorandum

Mr. Seymour Farber, Attorney, Department of Justice, for respondents. *Mr. Alan S. Rosenthal,* Attorney, Department of Justice, also entered an appearance for respondents.

Before PRETTYMAN, *Chief Judge of the Circuit.*

The matter before me is a motion for leave to file an application for an order designating two judges to complete a District Court of three judges to hear a motion for review.[1] It is presented to me as Chief Judge of the Circuit. The motion for leave to file seems a rather complicated procedure, but in this instance I am inclined to agree with counsel that it serves to separate and simplify the issues.

As I understand it, the basic controversy involves an import tax on petroleum. The Treasury collected one-half cent per gallon, and the importers, of whom the present movant is one, think the tax should properly have been one-fourth cent. Movant, among others, filed suit in the Customs Court, but that suit has not come on for trial. Two other importers won in test cases in the Customs Court, but the decisions were reversed by the Court of Customs and Patent Appeals. *Certiorari* was denied by the Supreme Court, and the Department of Justice refused to stipulate that the tax should be lower. Our present movant, Eastern States Petroleum Corporation, then filed a civil action in the District Court here in the District of Columbia, in which it sought judgment that the one-half cent tax was wrong and the one-fourth cent tax correct, and also sought an injunction to restrain certain Government officials, including the Attorney General, an Assistant Attorney General, and the Secretary of the Treasury, from

[1] 62 STAT. 968 (1948), 28 U.S.C. §§ 2282, 2284.

collecting the one-half cent. It claimed that the situation created by what had thereto- [3] fore taken place, that is, the suits in the Customs Court and Court of Customs and Patent Appeals and the refusal of the Attorney General to act, placed it in such a position that it was denied constitutional rights; and it further contended that the statute, as construed in those proceedings, is unconstitutional. The District Court was of the view, as I understand it, that it lacked jurisdiction over the law suit, that exclusive jurisdiction to review the matter of this import tax was in the Customs Court, the Court of Customs and Patent Appeals, and the Supreme Court. The District Court on that basis dismissed the complaint.

Then arose the question: What is the procedure by which review can be had of the District Court's failure to notify the Chief Judge of the Circuit of the filing of an application for an injunction so that a three-judge court might be convened? That controversy revolves about Section 2284, Title 28, United States Code. The possibilities are: (1) a petition for *mandamus* might lie to the Supreme Court; (2) an appeal from the order of dismissal might be taken to the Court of Appeals for the Circuit; and (3) the alternative presented to me today, that the Chief Judge of the Circuit either directly convene a three-judge court or *mandamus* the District Court to give the necessary statutory notice to the Chief Judge so that he may convene a three-judge court. The purpose of the present motion is to get a review by a three-judge court of the action of the single District Judge in dismissing the action for lack of jurisdiction. The question before me does not involve the validity of the action of a District Judge on the merits of a controversy.

Memorandum

The first basic question is: Assuming that the District Court lacked jurisdiction to hear the case, could the single judge to whom the application was presented dismiss the complaint on that ground?

Some of the statutes upon which Section 2284 is based were written long ago; one was written in 1942; the re-
[4] vision was made in 1948.[2] Prior to 1948, as I understand it, the Supreme Court held in several cases that a single judge could dismiss for lack of jurisdiction without calling, under the procedure then applicable, a three-judge court.[3] It held further that the only available review of the dismissal was by a writ of *mandamus* from the Supreme Court.[4] The movant here says these rules were altered by the statutes of 1942 and 1948. But it is agreed that since the new statutes were enacted this court, in *White* v. *Gates*,[5] entertained and considered an appeal from an order of a single judge of the District Court dismissing an action, and the Fourth Circuit, in *Jacobs* v. *Tawes*,[6] discussed the problem and held that an appeal would lie to the Circuit Court of Appeals from an order

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[2] For the legislative history of 28 U.S.C. §§ 2282, 2284, see Reviser's Note, H.R. REP. No. 308, 80th Cong., 1st Sess. A181, A182 (1947); JUD. CONF., U.S., REP. OF COMM. ON UNIFORM PROCEDURE FOR CONVENING DIST. CTS. OF THREE JUDGES 2, 6-7, 8, App. 10-11 (Oct. 3, 1944); H.R. REP. No. 1677, 77th Cong., 2d Sess. (1942); 65 A.B.A. REP. 171 (1940); 88 CONG. REC. 1969, 3069 (1942); S. REP. No. 963, H.R. REP. No. 212, H.R. REP. No. 1490, 75th Cong., 1st Sess. (1937); 81 CONG. REC. 139, 877, 956, 6740, 7045 (1937).

[3] *Stratton* v. *St. Louis S.W. Ry.*, 282 U. S. 10 (1930); *California Water Service Co.* v. *Redding*, 304 U. S. 252 (1938); *Ex parte Poresky*, 290 U. S. 30 (1933).

[4] *Stratton* v. *St. Louis S.W. Ry.*, 282 U. S. 10, 16 (1930).

[5] 102 U. S. App. D.C. 346, 253 F. 2d 868 (1958), *cert. denied*, 356 U. S. 973 (1958).

[6] 250 F. 2d 611 (1957).

of a single District Judge dismissing a case for lack of jurisdiction without notifying the Chief Judge of the Circuit of the request for a three-judge court. The Ninth Circuit held to the same effect in *Wicks* v. *Southern Pa-*
[5] *cific Co.*,[7] where the initial question was whether a substantial constitutional issue was presented.

This brings me to a reading of the statute. Section 2284 opens:

> "In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> "(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding."

The argument of the movant is that this section makes clear that the District Judge must, as a purely ministerial duty, immediately notify the Chief Judge of the Circuit of the application for an injunction and that the Chief Judge must then, as a matter of ministerial duty, convene a three-judge court. As I understand the argument, movant says the statute makes perfectly clear that the Court of Appeals, as such, has nothing to do with a three-judge court; that, if the District Judge does not do what the statute tells him to do, then the Chief Judge of the Cir-

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[7] 231 F. 2d 130 (1956), *cert. and motion to file petition for writ of mandamus denied*, 351 U. S. 946 (1956).

cuit must act and either forthwith constitute the three-judge court or require the District Judge to comply with the statute. The statute, says movant, contemplates action by the District Judge and the Chief Judge of the Circuit, and by nobody else.

Subsection (5) of Section 2284 says:

> "Any one of the three judges of the court may perform all functions, conduct all proceedings except the [6] trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing."

Movant says, as I understand it, two things about this subsection. First, it says that the second sentence states flatly that a single judge shall not dismiss an action. Second, it says that the subsection, in its last sentence, provides that an action of a single judge shall be reviewable by the full court, meaning a full statutory court of three judges. Movant says the latter provision sets up a statutory review procedure. It wants the single judge action in this case reviewed and says the review procedure is prescribed by statute.

Admittedly this is a novel problem, and it is difficult; but some conclusions seem reasonably clear to me. It seems to me, first of all, that weight must be given to the opening clauses of Section 2284. "In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise

provided by law, shall be as follows: * * *." Before you get off base, before you get into any procedure, you must have an action required to be heard by a District Court of three judges. Suppose you do not have such an action. Suppose there is not an action required by an Act of Congress to be heard and determined by a District Court of three judges. Then, it seems to me, you do not get any further under the statute. If that be so, then somebody other than a three-judge court has to decide in the very first instance whether there is any jurisdiction at all in the District Court.

If we do have to proceed under the statute, subsection (1) says: "On the filing of the application [*i.e.*, an appli- [7] cation for injunction] he [the District Judge to whom the application is presented] shall immediately notify the chief judge of the circuit". When we look back at the cases which the Supreme Court decided before this statute was enacted,[8] we find that the statute under which those cases were decided contained the phrase "shall immediately"—the District Court should immediately call two other judges. But those Supreme Court cases held that the single judge could dismiss for lack of jurisdiction without calling the two judges. It would seem to me the leeway that was in the old statute remains in the new when the same phrase is used. The District Judge makes a request of a different person, but the phrase is that he must "immediately" do something. This conclusion is reinforced by the report of the Committee which recommended the new section to the Judicial Conference. It indicates that there was no intent to change existing law in respect to the powers of a District Judge prior to notifying the Chief Judge of the Circuit. The report said:

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[8] *E.g.*, cases cited in note 3, *supra*.

Memorandum

> "The section [Section 208 of the Judicial Code, pertaining to Interstate Commerce Commission cases] as proposed to be amended thus provides that judges who are to sit in the three-judge district court shall be designated by the senior circuit judge upon request of the judge to whom the application is made and that it shall be the duty of the judges designated by the senior circuit judge to participate in the hearing and determination of the case. It is likewise provided that the single judge to whom the application is made may after hearing grant a temporary restraining order to remain in force only until hearing and determination of the application for an interlocutory injunction by the three judges. This will make it *unnecessary to convene the three-judge court immediately* to consider applications for temporary restraining orders pending hearing of the application for an interlocutory injunction. * * * It would seem that there is no more reason to require a court [8] of three judges to pass upon the grant of a temporary restraining order pending preliminary hearing in an Interstate Commerce Commission case than in a suit to restrain the operation of a *federal* or state statute. In the latter cases it has always been the rule that a single judge may grant a temporary restraining order for a limited time pending hearing by the three judges."[9] (Emphasis added.)

It is perfectly true that the District Judge to whom the application is presented is by statute made a member of the three-judge court. Movant stresses this provision, arguing that the District Judge is automatically a member of the three-judge court and everything he does after the application is filed is done as a member of that court. It seems to me this requirement of the statute is a future

[9] JUD. CONF., U. S., REP. OF COMM. ON UNIFORM PROCEDURE FOR CONVENING DIST. CTS. OF THREE JUDGES 6-7 (Oct. 3, 1944).

provision—the District Judge shall be a member when and if the court is constituted. The court is not constituted until the Chief Judge of the Circuit gets around to constituting it. It seems to me untenable to hold the District Judge to be a member of a three-judge court when no three-judge court is in being.

Moreover the requirement that the District Judge who receives the application be a member of the three-judge court appears most reasonable if he has more than the purely ministerial duty of notifying the Chief Judge of the Circuit. If he has the power—even the duty—to inquire into jurisdictional questions, his familiarity with the facts and law of the case should not be wasted by passing the whole question on to three other judges. If his function is purely ministerial, there would seem to be no valid reason for requiring him to be a member of the statutory court.

Getting over to subsection (5) of Section 2284, it seems to me the second sentence, speaking of a "single judge", [9] takes meaning from the first sentence, which uses the expression "Any one of the three judges of the court" (meaning the three-judge statutory court), and also from the last sentence, which uses the expression "single judge" and obviously contemplates that the three-judge court has been constituted. I think the expression "single judge", as it appears in the second sentence of subsection (5), refers to a single judge of a three-judge court. As I have already indicated, I think a three-judge court does not exist until it has been created by the Chief Judge of the Circuit.

The Fourth Circuit opinion in *Jacobs* v. *Tawes*, *supra*, while not controlling authority, is persuasive. I agree with its reasoning. The *Wicks* case, *supra*, is likewise

persuasive. And I cannot ignore the fact that our own court, in *White* v. *Gates, supra,* actually entertained and considered an appeal; while the point was not discussed, the consideration is a fact.

I do not give weight to the matter of relieving burdens on the courts; it does not make too much difference one way or the other. It does not matter if one method makes more paper work for the judge than does another. What does matter is what the Congress required to be done and what it is right to do.

If the statutes of 1942 and 1948 have not changed review procedure, the only proper method of review is by writ of *mandamus* from the Supreme Court. If these statutes have changed the method of review, it appears that an appeal will lie to our Court of Appeals. Once I reach the conclusion that this movant has one of these alternative procedures open to it, then, in so far as I am concerned, I shall not exercise the power of *mandamus*, even if I have it. If you have an appeal which is an adequate review, the extraordinary remedy of *mandamus* will not be granted.

Sometimes we get mixed up on this matter of jurisdiction. "Jurisdiction" is used to describe authority to enter-
[10] tain an action and also to describe authority to enter a judgment in a matter. Sometimes we say a court has jurisdiction to determine whether it has jurisdiction. Somebody along the line has to determine whether there is jurisdiction in the first sense. It looks as though we have come out with an answer that a single District Judge has jurisdiction to determine whether the District Court has jurisdiction. The sum total, according to my notion, is that on an application for an injunction in one of these cases a single District Judge can determine whether there

is any jurisdiction in the District Court over the cause of action.

So, gentlemen, I will deny the motion for leave to file an application for an order designating two judges to complete a full District Court of three judges. Thank you for a very helpful argument. I think I have given you some idea of how I have analyzed the problem and what my conclusions are. We will enter an order at once so there will be no further delay in the litigation.

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No. [redacted] 79

In the Supreme Court of the United States

October Term, 1959

EASTERN STATES PETROLEUM CORPORATION, APPELLANT

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 934

EASTERN STATES PETROLEUM CORPORATION, APPELLANT

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, appellees move that the appeal from the judgment of the district court be dismissed, or, in the alternative, that the judgment be affirmed.

OPINIONS BELOW

Neither the memorandum opinion of the single judge district court nor its order dismissing the appellant's complaint (R. 64-65) is reported. The memorandum opinion of Chief Judge Prettyman of the Court of Appeals for the District of Columbia Circuit on appellant's "Motion for Leave to File an Application to the Chief Judge of the Circuit for an Order Designating

Two Judges to Complete the Full District Court of Three Judges to Hear Motion for Review" (J.S. A4-A14)[1] is not yet reported.

JURISDICTION

The judgment of the single judge district court was entered on December 10, 1958 (R. 65). Notice of appeal to this Court was filed on February 2, 1959 (R. 67-69). Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether, under 28 U.S.C. 1253, this Court has jurisdiction of an appeal from a judgment of a single judge district court which dismissed appellant's complaint on the ground that the issues sought to be raised were not cognizable in a federal district court.

2. Whether, assuming the judgment of the single judge district court is appealable under 28 U.S.C. 1253, the complaint was properly dismissed for want of jurisdiction on the ground that suit in the Customs Court constitutes appellant's exclusive judicial remedy.

STATUTES INVOLVED

The relevant statutes are set forth in the Appendix, *infra*, pp. 18-20.

STATEMENT

The underlying controversy which appellant has sought to litigate in a federal district court involves the tax rate on certain fuel oil imports made between January 1, 1951, and October 11, 1952. The factual and statutory background is concededly identical with two cases which have been fully litigated through the Customs

[1] "J. S." references are to appellant's Jurisdictional Statement.

Court and the Court of Customs and Patent Appeals. In both of those cases the Court of Customs and Patent Appeals held that the fuel oil imports were subject to a tax of ½ cent per gallon and this Court denied certiorari. *United States* v. *Metropolitan Petroleum Corp.*, 42 C.C.P.A. (Customs) 38, certiorari denied, 348 U.S. 858; *United States* v. *American Bitumuls & Asphalt Co.*, 44 C.C.P.A. (Customs) 199, certiorari denied, 355 U. S. 883.[2]

Some five months after the denial of certiorari in *American Bitumuls*, the appellant here, whose protest was and is still pending before the Customs Court, wrote to Assistant Attorney General Doub of the Civil Division of the Department of Justice, and stated, in pertinent part (R. 11):

> For reasons heretofore advanced in briefs filed by this office and served on you in [the] American Bitumuls case and in the case of *United States* v. *Metropolitan Petroleum Corp.*, C. A. D. 567, we asserted that assessment beyond ¼ cent per gallon is without authority in law. In both of the above suits, you defended the assessment and contested our contentions.
>
> In each of said cases, the Court of Customs and Patent Appeals rejected our construction of the applicable statute and construed said statute so as to sustain Presidential Proclamation No. 2901, the alleged authority for the assessment. The Court

[2] For a detailed discussion of the factual and statutory background, we respectfully refer the Court to the opinions of the Court of Customs and Patent Appeals in those cases and to the Brief for the United States in Opposition in *American Bitumuls & Asphalt Co.* v. *United States*, No. 493, October Term, 1957. It should be noted that the attorney for the oil importers in the two earlier cases is also of counsel for the appellant here.

also reversed our contention that said statutes as thus construed would be unconstitutional.

We request you to reconsider your view with respect to these pending cases specifically those in the name of Eastern States Petroleum Co. v. United States, set forth on the stipulation annexed hereto and to enter into the enclosed stipulation agreeing that the correct rate of duty for the merchandise covered by the entries named in said case is ¼ cent per gallon.

On March 24, 1958, the Chief of the Customs Section of the Civil Division of the Department of Justice, on behalf of Assistant Attorney General Doub, responded in pertinent part as follows (R. 12):

Your proposed stipulation sets forth that the merchandise, the subject of the protests, was assessed with duty at ½ cent per gallon under "purported authority" of Presidential Proclamation No. 2901 and then states that such merchandise "is properly dutiable at ¼ cent per gallon."

I cannot sign such an agreement. The cases of *United States* v. *Metropolitan Petroleum Corp.*, C. A. D. 567, and *United States* v. *American Bitumuls & Asphalt Co., et al.*, C. A. D. 661 (certiorari denied Nov. 25, 1957) both upheld the assessment of the ½ cent per gallon tax under the provisions of Section 3422 of the Internal Revenue Code (26 U.S.C.).

Your stipulation is returned herewith unsigned.

Shortly thereafter, appellant brought this suit in the district court (R. 1-8) seeking to enjoin Attorney General Rogers and Assistant Attorney General Doub from

enforcing the Act of Congress upon which the imposition of the import tax is based by "bringing about [its] adjudicatory application to plaintiff by the customs courts" (R. 6); or, in the alternative, to enjoin Attorney General Rogers and Assistant Attorney General Doub from refusing to stipulate that the lawful rate of duty was ¼ cent per gallon (R. 8). Appellant also demanded that Secretary of the Treasury Anderson be enjoined "from authorizing his subordinate officials from enforcing the said Act." (R. 8.)

The Government filed a motion to dismiss for lack of jurisdiction, urging that the subject matter of the complaint was within the exclusive jurisdiction of the Customs Court (R. 13-18). Appellant then filed a composite motion for summary judgment, "for an order providing for an integrated hearing of said motion and of defendant's motion to dismiss, and for an order convening a pre-hearing conference." (R. 19-21.) Simultaneously, appellant filed an "application for the convening of a statutory court of three judges." (R. 50-51.)

On November 25, 1958, the district court granted the Government's motion to dismiss for lack of jurisdiction (R. 64). In its "Memorandum" on the motion, the court stated, "Since this Court is wholly without jurisdiction, it is not necessary to convene a three judge court to pass on that question but action may be taken by a single judge. *Jacobs* v. *Tawes*, 250 F. 2d 611." *(Ibid.)* The final order dismissing the complaint and denying the appellant's application for a three judge court was entered on December 10, 1958. (R. 65).

On December 18, 1958, appellant filed in the Court of Appeals a "Motion for Leave to File an Application

to the Chief Judge of the Circuit for an Order Designating Two Judges to Complete the Full District Court of Three Judges to Hear Motion for Review." At the conclusion of oral argument of the motion on January 7, 1959, it was denied by Chief Judge Prettyman.[3] Notice of appeal to this Court from the judgment of the district court was thereafter filed on February 2, 1959 (R. 67-69). A "notice of precautionary appeal" to the United States Court of Appeals for the District of Columbia Circuit from the judgment of the district court was filed on February 6, 1959 (R. 71); the perfecting of that appeal is being held in abeyance pending final disposition of the proceedings in this Court.

ARGUMENT

1. The appeal should be dismissed. 28 U.S.C. 1253, *infra*, p. 18, which is captioned "Direct appeals from decisions of three-judge courts", provides for direct appeal to this Court from "an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action * * * required by any Act of Congress to be heard and determined by a district court of three judges." In this case, a single district judge has concluded that the appellant's action was not cognizable in *any* federal district court—let alone one comprised of three judges. This single judge determination is plainly reviewable in the Court of Appeals (to which court appellant has filed timely notice of appeal). Accordingly, appellant cannot invoke this Court's extraordinary appellate jurisdiction under 28 U.S.C. 1253.

[3] On February 5, 1959, Judge Prettyman filed a memorandum opinion (see J. S. A1-A11) setting forth his reasons for denial of the motion.

Appellant's contention that its application for injunctive relief automatically required the convening of a three judge court, and hence renders this action properly appealable under 28 U.S.C. 1253, is unsound. Even if the appellate jurisdiction conferred on this Court by 28 U.S.C. 1253 were not limited to determinations by three judge courts,[4] the appeal would lack substance since a three judge court need not be convened merely because a party raises a purported constitutional question and couples it with a prayer for injunctive relief.

The three judge court provisions (28 U.S.C. 2282, 2284, *infra*, pp. 19-20) did not create any new jurisdiction in the district courts, but merely provided a new procedure for dealing with a specified category of cases already within their jurisdiction. The single district judge to whom the application for a three judge court is presented under 28 U.S.C. 2284, *infra*, pp. 19-20, must therefore make two threshhold determinations: (1) As in all other cases, whether the district court has any jurisdiction whatsoever;[5] (2) assuming jurisdiction exists, whether a substantial constitutional question is presented which requires the convening of a three judge court.[6]

[4] We are aware of no case in which this Court, under 28 U.S.C. 1253, has allowed a direct appeal from an action of a single judge district court. This is fully understandable in light of the strict construction which the court has traditionally given the three judge court statutes, see *e.g., Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 375-378, and the fact, as noted above, that Section 1253 is captioned "Direct appeals from decisions of three-judge courts."

[5] *E.g., Carrigan v. Sunland-Tujunga Telephone Co.*, 263 F. 2d 568 (C.A. 9); *Jacobs v. Tawes*, 250 F. 2d 611 (C.A. 4).

[6] See, *e.g., California Water Service Co. v. Redding*, 304 U.S. 252; *Ex parte Poresky*, 290 U.S. 30.

Appellant admits (J. S. 7-8) that, prior to the enactment of 28 U.S.C. 2284 (5), *infra*, p. 20, a single district judge was empowered to make these determinations, and was not automatically required to convene a three judge court. It contends, however, that this eminently practical rule was deliberately abandoned by Congress when it enacted Section 2284 (5), which sets forth the composition and procedure for three judge courts.

It seems plain, however, from the statutory scheme and context that Section 2284 (5) is applicable only *after* a three judge court has been convened. To facilitate the business of three judge courts—which in many circuits must be assembled from widely separated courts (see *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292 U.S. 386, 391; *Phillips* v. *United States*, 312 U.S. 246)—the section authorizes single members of such courts to perform all functions in connection with the proceedings except to conduct the trial, determine applications for the issuance or vacation of interlocutory injunctions, appoint masters, order references, "or dismiss the action, or enter a summary or final judgment". These provisions serve simply to delimit the powers of the individual members of the three judge court and have no bearing upon the power of the judge to whom the application for a three judge court is presented. See, *e.g.*, *Jacobs* v. *Tawes*, 250 F. 2d 611 (C.A. 4); *Carrigan* v. *Sunland-Tujunga Telephone Co.*, 263 F. 2d 568 (C.A. 9); *Wicks* v. *Southern Pacific Co.*, 231 F. 2d 130 (C.A. 9), certiorari and motion to file petition for mandamus denied *sub nom. Wicks et al.* v. *Brotherhood of Maintenance of Way Employees et*

al., 351 U. S. 946; *Van Buskirk* v. *Wilkinson*, 216 F. 2d 735 (C.A. 9).

In *Jacobs* v. *Tawes*, *supra*, the Fourth Circuit squarely rejected the contention that, under 28 U.S.C. 2284 (5), the single district judge was required automatically to notify the Chief Judge of the Circuit to call in two additional judges. In that case, the plaintiff sought to enjoin certain Maryland officials from assessing taxes which, he alleged, were unconstitutional as applied to him. The district judge, before whom an application for a three judge court had been filed, dismissed the action on the ground that it did not involve the requisite jurisdictional amount of $3,000. *Jacobs* v. *Tawes*, 151 F. Supp. 770 (D. Md.). Holding that the order of dismissal was "clearly correct", Chief Judge Parker, for a unanimous court, stated (250 F. 2d at 614):

> * * * [I]t is not required that the [two] additional judges be summoned, when, as here, it appears from the complaint itself that the case is not one within the jurisdiction of the court. Such a case is manifestly not one "required by Act of Congress to be heard and determined by a district court of three judges" within the language of 28 U.S.C. § 2284. As said in *Ex parte Poresky*, *supra*, "* * * the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction."

Appellant is forced to the position that *Jacobs* v. *Tawes* and the other above-cited cases, all of which were subsequent to the enactment of the 1942 amendment to the three judge court provisions, were erroneously

decided.[7] Thus, it urges that Congress, in enacting Section 2284 (5), intended to overrule *Ex parte Poresky*, 290 U. S. 30, and to prohibit a single district judge, in all circumstances, from dismissing an action where an application for a three judge court has been made.[8] This construction of Section 2284 (5) was expressly rejected by both the Fourth Circuit in *Jacobs v. Tawes, supra*, and the Ninth Circuit in *Carrigan v. Sunland-Tujunga Telephone Co.*, 263 F. 2d 568, and *Van Buskirk v. Wilkinson*, 216 F. 2d 735. As stated in *Jacobs v. Tawes* (250 F. 2d 611, 614-615):

> The rule laid down in Ex parte Poresky, supra, has not been changed by anything contained in

[7] See also *Otten v. Baltimore and Ohio R. Co.*, 205 F. 2d 58 (C.A. 2); *White v. Gates*, 253 F. 2d 868 (C. A. D.C.), certiorari denied, 356 U.S. 973.

[8] Appellant relies principally (J. S. 37-38) on an item of legislative history which reveals that one of the bar associations supporting the provision stated that it would overrule *Ex parte Poresky*, and argued that such a result was desirable so as to prevent the single judge from making a preliminary determination of a statute's constitutionality. See H. Rept. No. 1677, 77th Cong., 2d Sess., p. 5 (letter from the Committee on Federal Legislation of the Association of the Bar of the City of New York.) There is not the slightest indication either in the body of the House Report or in another letter from the Committee on Jurisprudence and Law Reform of the American Bar Association that the provision was designed to overrule any decisions of this Court. On the contrary, the House Report clearly indicates that the real objective of the statute was to define the powers of the individual members of a three judge court *after* it had convened, in order to allow an individual judge to handle preliminary proceedings provided by the Federal Rules of Civil Procedure, such as depositions and discoveries. See H. Rept. No. 1677, *supra*; 65 A. B. A. Rep. 171. Moreover, even if there were merit to the contention that the provision precluded dismissal by a single judge for want of a substantial constitutional question, the present case is distinguishable since the dismissal here was bottomed solely on the fact that there was no district court jurisdiction whatsoever.

28 U.S.C. § 2284. That section was enacted to codify and clarify the practice with respect to the composition of and procedure before courts of three judges. Subsection 5 of the section was manifestly intended to regulate procedure after the court of three judges had been constituted, not to abrogate the salutary rule that the judge before whom the action was brought may dismiss it if the complaint does not state a case within the jurisdiction of the District Court. In the case of Van Buskirk v. Wilkinson, 9 Cir., 216 F. 2d 735, 737, which was decided after the enactment of 28 U.S.C. § 2284(5), the Court of Appeals of the Ninth Circuit sustained the dismissal by a single District Judge, before a court of three judges had been constituted, of a petition for an injunction against the enforcement of an act of Congress. The opinion in the case was written by Judge Driver, a member of the Supreme Court's committee on Rules of Civil Procedure, who used the following language of peculiar pertinency to the case before us, viz.:

> "The only statutory basis for jurisdiction in the District Court cited by appellant, either in his petition or his brief on appeal, consists of Sections 2282 and 2284 of Title 28 U.S.C.A. The cited sections are not jurisdictional but procedural. They provide that in certain circumstances a District Court must consist of three judges. Necessarily they assume jurisdiction in the court under some other statutory provision. In order for a District Court to have jurisdiction in a case arising under them, there must be both

a substantial federal question and the jurisdictional minimum amount in controversy.

* * * * * *

"Appellant's petition in the District Court does not contain any allegation whatsoever of any amount in controversy. The omission is fatal if the petition is to be taken for what it purports to be, namely, an application for injunction and declaratory relief in a civil action arising under the Constitution and laws of the United States."

As the Fourth Circuit went on to point out (*id.* at 615):

> If the single District Judge in dismissing the case for lack of jurisdiction commits error, the error can be corrected by appeal to the Court of Appeals without burdening the Supreme Court with a direct appeal.

Appellant here has filed timely notice of appeal to the Court of Appeals for the District of Columbia Circuit. The decision of the single judge district court, if erroneous, can be corrected in that court. Hence this Court's dismissal of the present appeal would not affect appellant's proper remedy. Cf. *Phillips v. United States*, 312 U. S. 246, 251.

2. Even if the Court should decide that the judgment of the single judge district court dismissing the complaint falls within the appellate jurisdiction of this Court under 28 U.S.C. 1253, that judgment is correct and should be affirmed.

Through the establishment of the Customs Court and the Court of Customs and Patent Appeals, with ultimate review to this Court by a writ of certiorari,

Congress has provided an avenue for obtaining redress for asserted grievances or wrongs occurring in the operation of laws relating to the exaction of duties by customs collectors. And in providing a specialized forum for considering controversies arising out of such exactions, Congress has stipulated that the jurisdiction vested in the Customs Court shall be exclusive. 28 U.S.C. 1581, *infra*, pp. 18-19, declares:

> "The Customs Court shall have exclusive jurisdiction to review on protest the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury . . ."

To avoid all doubt as to the exclusiveness of the Customs Court's jurisdiction, Congress, in defining the original jurisdiction of the district courts, has expressly excepted from that jurisdiction of the district courts "matters within the jurisdiction of the Customs Court." 28 U.S.C. 1340, *infra*, p. 18. Final decisions of the Customs Court are subject to review by appeal to the Court of Customs and Patent Appeals. 28 U.S.C. 1541 and, in turn, cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of "certiorari." 28 U.S.C. 1256, *infra*, p. 18.

The explicit provisions placing jurisdiction in the Customs Court to the exclusion of the district courts mark the continuation of a well-defined and long-established policy.[*] Thus, the courts have

[*] Congress initiated this practice with the Customs Administration Act of 1890, 26 Stat. 131, in which it ordered the establishment of a separate special system of courts for the

repeatedly recognized, even in cases which arose prior to the adoption of the explicit provision appearing in 28 U.S.C. 1583, that the Customs Court has exclusive jurisdiction with respect to customs controversies, and that, by the same token, the district courts are without jurisdiction. *Morgantown Glassware Guild, Inc.* v. *Humphrey*, 236 F. 2d 670 (C.A. D.C.), certiorari denied, 352 U.S. 896; *United States* v. *Sherman & Sons Co.*, 237 U.S. 146, 152; *Boston Wood Trade Ass'n* v. *Snyder*, 161 F. 2d 648 (C.A. D.C.); *United States* v. *Cottman Co.*, 190 F. 2d 805 (C.A. 4), certiorari denied, 342 U.S. 903; *Cottman Co.* v. *Dailey*, 94 F. 2d 85 (C.A. 4); *David L. Moss Co.* v. *United States*, 103 F. 2d 395 (C.C.P.A.); *Riccomini* v. *United States*, 69 F. 2d 480 (C.A. 9); *Patchogue-Plymouth Mills Corp.* v. *Durning*, 101 F. 2d 41 (C.A. 2); *Gulbenkian* v. *United States*, 186 Fed. 133 (C.A. 2).

The fact that an impost is attacked on constitutional grounds does not alter the jurisdictional scheme. In *Horton* v. *Humphrey*, 146 F. Supp. 819 (D.D.C.), affirmed, 352 U.S. 921 the plaintiffs, suing in the district

---

resolution of customs controversies. In the 1890 Act, Congress provided for a Board of General Appraisers (Section 12, 26 Stat. 136), which was to have jurisdiction over all protests from decisions of the collectors of customs, and appeals for reappraisement. Sections 13, 14, 26 Stat. 136-138. Under Section 15 of the 1890 Act (26 Stat. 138), the courts of general jurisdiction participated in this review procedure at the appellate level. However, even this participation was eliminated by the Tariff Act of 1909, 36 Stat. 11, 91. By that Act, Congress withdrew from the courts of appeals jurisdiction to review decisions of the Board of General Appraisers and vested that jurisdiction in the Court of Customs Appeals, which it simultaneously established. Section 29, 36 Stat. 105-107. In 1926, the Board of General Appraisers was redesignated as the Customs Court. 44 Stat. 669. The present provision for exclusive jurisdiction in that court (28 U.S.C. 1583) first appeared in the 1948 revision of the Judicial Code (62 Stat. 943).

court, sought to enjoin the Secretary of the Treasury and his agents from applying a "special dumping duty" imposed by the Antidumping Act of 1921 to certain of their imports. A three judge court was convened to consider the plaintiff's charges that the Antidumping Act was repugnant to the Constitution. The three judge court ruled that, despite the alleged constitutional deprivation, the district court was without jurisdiction. It stated (146 F. Supp. 819, 820):

> The imposition of a duty may under the statutory plan be reviewed by the Customs Court and the Court of Customs and Patent Appeals (with recourse to the Supreme Court through petition for certiorari). This statutory form of review has been held, in comparable situations, to constitute an adequate remedy at law and therefore to bar equitable relief, and to be the exclusive method of review. * * *

Thus, *Horton* v. *Humphrey* unqualifiedly stands for the proposition that any controversy within the jurisdiction of the Customs Court—regardless of the constitutional cloak with which the importer seeks to surround it—is exclusively relegated to that court. In this case, appellant admittedly (*supra*, pp. 3-4) seeks to relitigate in the district court the very controversy which has been decided adversely to the other fuel importers by the Court of Customs and Patent Appeals.[10]

[10] Appellant's attempt (J. S. 44-45) to interpret *Horton* v. *Humphrey* as holding merely that the district court lacked jurisdiction for failure of plaintiff to exhaust his Customs Court remedies is unfounded. The court's decision, as the opinion clearly indicates, was based on the *exclusivity* of the Customs Court procedure, not on any theory of exhaustion. We therefore pass the point that appellant's protest is still pending in the Customs Court.

Appellant further argues (J.S. 49-55) that it is entitled to have its constitutional allegations determined by the district court because the Customs Court is not a constitutional court. Quite apart from the fact that Congress has declared both the Customs Court and the Court of Customs and Patent Appeals to be constitutional courts,[11] it is well settled that the presence of constitutional issues does not call for an exception from the exclusiveness of the Customs Court's jurisdiction. *Horton* v. *Humphrey, supra; Morgantown Glassware Guild, Inc.* v. *Humphrey*, 236 F. 2d 670 (C.A. D.C.), certiorari denied, 352 U.S. 896; *Cottman Co.* v. *Dailey*, 94 F. 2d 85, 88-89 (C.A. 4); *Riccomini* v. *United States*, 69 F. 2d 480, 483 (C.A. 9). Whatever the situation might be if all access to a constitutional court were precluded, the fact that this Court may review decisions of the Court of Customs and Patent Appeals undercuts the argument.

In short, Congress has provided a complete and exclusive judicial remedy—litigation in the Customs Court, appeal to the Court of Customs and Patent Appeals, ultimate review by this Court—for the resolution of appellant's grievances. Accordingly, the district court correctly concluded that it was without jurisdiction.

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal should be dismissed or, in the alternative, that the judgment of the district court should be affirmed.

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JUNE 1959.

APPENDIX

28 U.S.C. 1253 provides as follows:

§1253. Direct appeals from decisions of three-judge courts.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. 1256 provides as follows:

§1256. Court of Customs and Patent Appeals: certiorari.

Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari.

28 U.S.C. 1340 provides as follows:

§1340. Internal revenue; customs duties.

The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

28 U.S.C. 1583 provides as follows:

§1583. Review of decisions on protests.

The Customs Court shall have exclusive jurisdiction to review on protest the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the

Treasury; decisions excluding any merchandise from entry or delivery, under any provision of the customs laws; and the liquidation or reliquidation of any entry, or the refusal to pay any claim for drawback or to reliquidate an entry for a clerical error as provided by the customs laws.

28 U.S.C. 2282 provides as follows:

> §2282. Injunction against enforcement of Federal statute; three-judge court required.
>
> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. 2284 in pertinent part provides:

> §2284. Three-judge district court; composition; procedure.
>
> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court: On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

* * * * *

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

* * * * *

[redacted]

FILE COPY

No. 70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

EASTERN STATES PETROLEUM CORP.,
Appellant,

WILLIAM P. ROGERS, Attorney General of The United States, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 70

EASTERN STATES PETROLEUM CORP., *Appellant,*

v.

WILLIAM P. ROGERS, Attorney General of the United States, et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

This brief is submitted by appellant, pursuant to R.R. 16(3),[1] in order to present the contentions and arguments, against the granting of appellees' motion for a summary dismissal or affirmance, which follow.

Opinions Below

Chief Judge Prettyman's memorandum opinion has been reported since appellees' Motion was filed. See 265 F. 2d 593. Judge McGarraghy's memorandum has not been reported.[2]

[1] An extension to August 5, 1959 of the time for filing this brief was obtained, pursuant to R.R. 34(5), on July 6, 1959.

[2] The "See also" citation to 165 F. Supp. 363, which was added to the print of Chief Judge Prettyman's opinion in the FEDERAL REPORTER, cited above, does not refer to an opinion pertinent to this case; it refers to a district court decision in an action, brought by Eastern States through other counsel, which stemmed from a completely different controversy and raised entirely different legal issues. See *Eastern States Petroleum & Chemical Corporation* v. *Seaton, et al.*, 165 F. Supp. 363 (D.D.C. 1958).

CONTENTION I.

The Showing In Support Of Appellee's Motion To Dismiss Wholly Fails, and Barely Purports, To Satisfy the Requirements for a Summary Dismissal.

R.R. 16(4), 16(1)(a), 15(1)(f) and 15(1)(b) contemplate *summary* dismissal of an appeal from a federal court only if any question concerning this Court's jurisdiction presented by a Jurisdictional Statement is not "so substantial", when viewed in light of an appellee's Motion, as to require plenary consideration. Unless the concept of "substantiality" operative here is to be deprived of all meaning suggested by the concept of "unsubstantiality" from which it was derived,[3] appellees' Motion To Dismiss must be denied. The showing in appellees' Motion wholly fails, and barely purports, to demonstrate that the questions pertaining to this Court's jurisdiction which appellant has sought to raise lack sufficient substance to require plenary processing.

Appellees did not even contend, expressly or by clear implication, that the questions raised by appellant's contentions in favor of this Court's jurisdiction approached unsubstantiality or lacked sufficient substance to require plenary processing. More important, appellees did not present a showing of authorities and arguments at all adequate to support such a contention or conclusion.

Appellees did not, and could not, cite any decisions *of this Court* which (even) tended to foreclose the jurisdictional questions appellant has sought to present by re-

[3] Under *Hannis Distilling Co.* v. *Baltimore*, 216 U. S. 285, 288 (1910), and the many subsequent decisions of this Court which quote *Hannis*, a question presented by a contention is "unsubstantial" if: "its unsoundness so clearly results from the previous decisions *of this court* as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." (Emphasis supplied.)

jecting (even remotely) comparable contentions. And, the Courts of Appeals decisions on which appellees' competing contentions against this Court's jurisdiction are grounded were not supported by opinions which made reasoned choices among contentions like appellees', contentions that were documented and argued like appellant's, and contentions grounded on the *Stratton* line of authority. Specifically:

A. On the Question (No. I) concerning the now proper form of appellate proceeding, the Solicitor General did not argue that this Court's holdings or reasoning in *Ex parte Metropolitan Water*[4] and *Stratton*[5] tend to foreclose our contention in favor of "direct appeal" under the statute as revised. Rather, he implicitly conceded our position that the rule of those cases, requiring mandamus proceedings, has been superseded by subsequent developments.[6] This concession of change, and the conflicting contention on the new form of proceeding that is now proper, actually function to prove, not disprove, the substantiality of the Question.

Appellees made no effort to discredit or discount the substantiality of the arguments in support of our construction of Section 1253 which we derived from this Court's opinions in *Ayrshire Collieries Corp.* v. *United*

[4] 220 U. S. 539 (1911).

[5] *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10 (1930).

[6] This concession takes the form of a contention that appeal to the Courts of Appeals is the now proper form of appellate proceeding for asserting a claim that a single judge has erroneously dismissed a complaint of a type requiring determination by a court of three judges. Appellees' contention to that effect, in their MOTION at 6 and 12, is inconsistent with the holding in *Stratton* and the reasoning in *Metropolitan Water*. The companion assertion of that contention at page 4 of the Solicitor General's BRIEF IN OPPOSITION to our MOTION FOR LEAVE TO FILE our PETITION FOR WRITS OF MANDAMUS, Misc. No. 34 (Misc. No. 904 of last term) is inconsistent with the holdings in both cases.

States, 331 U. S. 132 (1947)[7] and *Fleming* v. *Rhodes*, 331 U. S. 100 (1947)[8] on the proper construction of related, direct appeal, statutes. And, appellees' statement: "We are aware of no case in which this Court, under 28 U.S.C. 1253, has allowed a direct appeal from an action of a single judge district court. * * *"[9] provides no support for a motion for *summary* dismissal. First, the statement (can't and thus) doesn't imply that any decision of this Court has *disallowed any* claim of a right of direct appeal, under 1253, from a single judge order and has *thus* tended to foreclose appellant's contentions in support of its *narrow* claim;[10] there is no such decision. Second, appellees' statement constitutes a debatable summary of the precedents under 1253. To be at all persuasive in favor of *summary* dismissal, the statement should have been, but wasn't, supported by an argument discrediting our contention[11] that this Court's memorandum *affirmance* in *Horton* v. *Humphrey*[12] constituted a denial of Humphrey's alternative motion to dismiss and was thus a deliberate departure from the rule against direct appeals from single judge orders.[13]

[7] See our JURISDICTIONAL STATEMENT at 4, 24-5, 31, and 35.

[8] *Id.* at 35; and see *Id.* at p. 19, note 7 and p. 33, note 49. See also our PETITION at 72-7.

[9] See their MOTION at p. 7, note 4.

[10] Appellant has conceded that exercise of the new right of direct appeal under 1253 from single judge orders encompassed by its terms requires prior exhaustion, without success, of the opportunities under 2284(5) for obtaining three judge review and final determination of matters initially decided by a single judge. Cf. *Ex parte Fahey*, 332 U. S. 258 (1947) and the comment thereon in MOORE, COMMENTARY ON THE JUDICIAL CODE (1949) at 132 n. 35. Concerning the expansion of opportunities for three judge review of single judge action effected by the 1948 revision, see note 17, *infra*.

[11] See our JURISDICTIONAL STATEMENT at 4-5 and 22-3, note 21.

[12] 352 U. S. 921 (1956) *affirming* 146 F. Supp. 819 (D.D.C. 1956).

[13] Some support for our reading of *Horton* is provided by this Court's earlier refusal to grant the motion for summary dismissal filed in *Gray* v. *Bd. of Trustees*, 342 U. S. 517 (1952) and by the

Appellees' effort to discredit the substantiality of appellant's showing, collaterally, by presenting a sufficiently persuasive documentation of their competing contention in favor of appeal to the Courts of Appeals, wholly fails to satisfy the applicable burden of persuasion. If it is to support a *summary* rejection of an appellant's contention, a competing contention of an appellee must have a content such that its recognition would clearly preclude concurrent recognition of appellant's contention *and* the documentation of appellee's contention must be so convincing as to make further debate over the competing contentions unprofitable.[14] Here, however, recognition of jurisdiction over appeals, adequate to permit a determination whether an action was or was not one which required trial by three judges, in *both* this Court and the Courts of Appeals would not be unprecedented. See 18 U.S.C. §3731. *Cf. Ex parte Cogdell*, 342 U. S. 163 (1951). More critically, appellees' documentation of their contention is clearly not convincing enough to terminate debate. The absence of any decision *of this Court* upholding appellees' contention could be judged to be a critical deficiency in itself.[15] But, in any event, none of the Courts of Appeals decisions on

argument, in favor of direct appeal rather than mandamus, advanced in the Judges' response to the order to show cause why a writ of mandamus should not be granted which this Court had entered in the companion proceeding, *Ex parte Gray*, 342 U. S. 840 (1951). Some support for our reading of *Horton* is also provided by the difference between the announced grounds for the summary dismissal in *Illinois ex rel. Sankstone* v. *Jarecki*, 346 U. S. 861 (1953), *mem. dismissing* "for the want of a substantial federal question" an appeal from 116 F. Supp. 422 (N. D. Ill. 1953) (single judge order refusing to convene a three judge court and dismissing complaint for its failure to raise a substantial constitutional question) and the dismissals "for want of jurisdiction" in *Traffic Telephone Workers' Federation* v. *Driscoll*, 332 U. S. 833 (1947) and *Healy* v. *Ratta*, 289 U. S. 701 (1933) where the orders below were not encompassed by the terms of the direct appeal statutes.

[14] See note 3, *supra*.

[15] *Ibid.*

which appellees' contention is grounded are supported by a reasoned opinion which answers the insight into Congressional intent expressed in the following quotation from *Stratton:*

> "* * * Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court."[16]

And, none of those Courts of Appeals decisions made a reasoned choice, concerning the presently proper form of proceeding, which rejected a contention in favor of direct appeal to this Court which was documented and argued like appellant's contention here.[17]

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[16] See 282 U. S. at 16. Of appellees' Courts of Appeals precedents only *Wicks v. Southern Pacific Co.*, 231 F. 2d 130 (9th Cir. 1956) copes with *Stratton*, purporting to distinguish it. The recently reported decision of the Third Circuit in *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 266 F. 2d 427 (1959) also distinguishes *Stratton* but on a narrower, more tenable, ground and subject to overt recognition that *Stratton* precludes jurisdiction in the Courts of Appeals over the merits of an appeal from a dismissal by a single judge of an action claimed to be within the jurisdiction of a three-judge court.

[17] Appellant's contention in favor of direct appeals from decisions by single judges that are claimed to have required determination by three judges is narrowly formulated though heavily documented. The scope of our direct appeal contention is limited by our further contention that the decisions made appealable by Section 1253 are all decisions which should be finally, if not initially, decided by three judges as well as by our concession that exercise of this new right of direct appeal under 1253 from orders of single judges requires prior exhaustion, without success, of the new opportunities under 2284(5) for obtaining three judge review and final determination of matters initially decided by a single judge. None of the Courts of Appeals decisions in favor of appeal to those Courts considered the role in the whole review picture of the expansion of the scope of the Motion for Review by a full court of three judges to encom-

B. On the Question (No. II) whether issues of district court jurisdiction, raised by a complaint which asserts an action of a type described in a three-judge statute, have remained subject to final negative determination by a single district judge, despite the Act of April 6, 1942 and its perfecting revision in 1948, appellees again fail to cite any opinion of this Court which forecloses the contention which appellant has argued and documented. There is no such opinion.

Moreover, neither *Jacobs* v. *Tawes*,[18] nor any of the other Courts of Appeals opinions on which appellees rely, answered a multiple-grounded argument for Congressional supersession of *Poresky*[19] and *Redding*[20] such as appellant has pressed.[21] The *Jacobs* opinion, to which appellees direct most attention, wholly fails to cope with the Act of

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pass actions that single judges are *prohibited* from taking that seems to have been effected by the removal in 1948 of the Motion's original limitation to actions that single judges were "permitted" to take by themselves. On the 1948 revision, see our JURISDICTIONAL STATEMENT at page 40 in note 71; and see our PETITION at 21-5.

[18] 250 F. 2d 611 (4th Cir. 1957).

[19] *Ex parte Poresky*, 290 U. S. 30 (1935).

[20] *California Water Service Co.* v. *City of Redding*, 304 U. S. 252 (1938).

[21] Appellees' suggestion, in their MOTION at 10 n. 8, that the legislation may be read as precluding dismissal by a single judge for want of a substantial constitutional question without also being read as precluding single judge dismissals grounded on other jurisdictional conclusions flies in the face of Congressional intent. The exchanges at the Hearing of the House Committee on the 1942 Act clearly indicate that the Congressmen were desirous of removing even *procedural* issues, whose resolution may affect the outcome decisions, from the *final* authority of any single judge, even one who is a member of a three judge court. See the quotations from H. R. Rep. 1677 set forth in our PETITION at 63-6. Furthermore, the logic of the opinion in *Poresky* tends to oppose the creation of distinctions among jurisdictional issues and to favor their uniform treatment. Indeed, *Jacobs* documents its holding in favor of single judge authority over an issue of jurisdictional amount by a reference to the language in *Poresky* favorable to single judge authority over all jurisdictional issues. See the quotation from *Jacobs* in appellees' MOTION at 9.

1942 and its legislative history,[22] the implications of the express preclusion of single judge action in Sections 2281 and 2282, or the implications of the provisions concerning single judges in Sections 2284(1) and 2284(3). And, despite the opinions in *Jacobs* and *Van Buskirk*,[23] Chief Judge Prettyman characterized the questions we presented to him as "novel" and "difficult".[24]

Even if Chief Judge Prettyman's answers to our contentions should be thought to discount the "novelty and difficulty" of the questions as now presented on this appeal, our documented replies to the Chief Judge's answers[25] serve to preclude a discounting from "novelty and difficulty" down to "unsubstantiality" or insufficient substantiality to require plenary consideration.[26]

[22] Chief Judge Prettyman also failed to answer the part of our argument which we grounded on the legislative history of the 1942 Act. Appellees have attempted to discredit our whole argument from legislative history by employing the device for a restrictive reading of Section 2284 that was employed in *Jacobs*. Thus appellees argue, directing attention particularly to House Report 1677, that the legislative materials on which we have relied are really only concerned with single judge authority *after* a three-judge court has convened. Because the participants in the House Committee Hearing did not emphasize the secondary, prohibitive, features of the Kefauver Bill, to discredit appellees' reading of the whole Report we must point to the facts (1) that no one at the Hearing took exception to the conclusion stated in the written submission by the Bar Ass'n of the City of New York and (2) that the Committee's favorable recommendation of the Bill was accompanied by an overt reference to that Bar's support of the Bill. The artificiality of a reading such as appellees suggest is more readily apparent with respect to the other legislative materials on which we have relied. See our PETITION at 70 n. 75, 76-7, 82, and 94-7.

[23] *Van Buskirk* v. *Wilkinson*, 216 F. 2d 735 (9th Cir. 1954); *Carrigan* v. *Sunland-Tujunga Telephone Co.*, 263 F. 2d 568 (9th Cir. 1959), which appellees also invoke in support of their reading of 2284, adds nothing of significance to the expressions in *Jacobs*.

[24] See 265 F. 2d at 595.

[25] See our JURISDICTIONAL STATEMENT at 41-2 and our PETITION at 88-98.

[26] The solid substantiality of our contention is enriched by the alternative holding in *Snyder's Drug Stores* v. *Taylor*, 227 F. 2d 162 (8th Cir. 1955), which tends to support our reading of 2284(5). This decision is ignored in the Chief Judge's opinion and in appellee's MOTION.

CONTENTION II

The Showing In Support Of Appellees' Motion To Affirm Fails To Satisfy the Requirements For a Summary Affirmance.

R.R. 16(1)(c) provides for summary affirmance only if the questions presented by an appellant's contentions in support of relief are seen to be unsubstantial when viewed in light of an appellee's preliminary showing. The showing in support of appellees' Motion to Affirm wholly fails to demonstrate the unsubstantiality of the contentions on which we have grounded our claim for relief.

We have not contested appellees' position that a *summary* rejection of our contention that the single judge lacked authority to finally dispose of our Complaint would, if proper, take the form of a summary dismissal rather than a summary affirmance; hence we discussed the substantiality of that contention for relief in Contention I, B, supra. Thus we are concerned at this point with the substantiality of Questions III, IV, and V of our Jurisdictional Statement.

Appellees only undertook to demonstrate the unsubstantiality of Questions III and V.[27] But, the authorities and arguments presented by appellees to show the unsubstantiality of our contention that the district court did not lack, but rather enjoyed, *jurisdiction* over our constitutional action do not include a single opinion of this Court or of any Court of Appeals which rejected or which

[27] Concerning Question No. IV, appellees only point out that Eastern States has not exhausted its resort to the Customs Court. See their Motion at 15 n. 10. Resting on their contention that the district courts have been wholly deprived of jurisdiction, appellees made no effort to answer our argument that the results of exhaustion in essentially identical cases have relieved Eastern States of a need to proceed any further in the Customs Courts.

forecloses a contention in favor of district court jurisdiction, under Section 1331, like appellant's.

The "jurisdictional" holdings in the Courts of Appeals decisions on which appellees rely conclude against "equity jurisdiction" over various injunction actions because of the "adequacy" or primacy, in the circumstances, of the legal remedy through the Customs Courts; all those decisions stop short of a holding that the district courts have been wholly deprived of jurisdiction over a complaint, like appellant's, which asserts an injunction action which arises under the Constitution. An analysis of the opinions prior to 1948 is set forth in our PETITION FOR WRITS OF MANDAMUS at pages 125-6.

Appellant has conceded that the 1948 revision of Sections 1340 and 1583 did go beyond the aforementioned opinions and did wholly deprive the district courts of jurisdiction over actions arising under the customs laws which present matters within the jurisdiction of the Customs Court.[28] And, appellant has conceded that district court jurisdiction over an action arising under the Constitution must be so exercised as not to invade the primary jurisdiction of the Customs Courts.[29] No decision of any Court of Appeals since the 1948 revision concludes that district court jurisdiction has been restricted any more severely than appellant concedes.

The only opinion which lends any real support to appellees' contention that the district court lacked jurisdiction under 1331 over appellant's Complaint is the opinion of the three judge court in *Horton* v. *Humphrey*.[30] While appellant did direct attention to contextual and textual features of that opinion which limit its value as a

[28] See our JURISDICTIONAL STATEMENT at 42; and see our PETITION at 122-7.

[29] See our JURISDICTIONAL STATEMENT at 46-7; and see our PETITION at 122-7.

[30] 146 F. Supp. 819 (D.D.C. 1956).

precedent for denying our contention;[31] we did not deny that it constituted a holding against district court jurisdiction nor claim that it was merely grounded on an exhaustion holding,[32] as appellees suggest we did.[33] What we did and do claim is that *this Court's* memorandum affirmance should not be interpreted, in light of the alternative, "exhaustion", argument presented in the Motion To Affirm filed by the Solicitor General for Humphrey, as constituting an affirmance of the judgment below *on the opinion below*.[34] Moreover, this Court's rejection of the jurisdictional and remedial contentions pressed in Horton's Jurisdictional Statement clearly did not foreclose approval of the obviously distinguishable contentions concerning the existence and exercise of district court jurisdiction under 1331 which appellant has argued and documented. Not only is the negative impact on appellant's contentions of *Lockerty v. Phillips*[35] minimal as compared to its impact on Horton's contentions, equally important, Horton did not present a documented argument, like appellant's, against the Constitutionality of a complete preclusion of district court jurisdiction when there is no alternative opportunity to be heard, as a matter of right, in some other ART. III court.

Appellant's showing on Question No. V, demonstrating the Unconstitutionality of a construction of the pertinent statutes which would deprive an importer of a right to be heard in *some* ART. III court, trial or appellate, before an ultimately final rejection of the type of Constitutional claim which Eastern States has asserted, is in no sense "undercut", down to unsubstantiality, by appellees' respon-

[31] See our JURISDICTIONAL STATEMENT at 43.

[32] *Id.* at 42-3.

[33] See their MOTION at 15 n. 10.

[34] See our JURISDICTIONAL STATEMENT at 44-5.

[35] 319 U. S. 182 (1943) discussed in our PETITION at 118-9, 130, and 138.

sive showing, as appellees seem to intimate.[36] Appellees' showing amounts to little, if anything, more than a reminder of the uncontested facts (1) that Congress has "declared" ART. III status for the Customs Courts and (2) that this Court may, in its discretion, afford a hearing in this Court on a petition for relief from an adverse constitutional holding in the Court of Customs and Patent Appeals. Appellees wholly failed to discount or undercut the documentation substantiating appellant's arguments (1) that the statute declaring the Court of Customs and Patent Appeals to be an ART. III court is Constitutionally ineffective[37] and (2) that the "right to be heard" applicable under the Constitution to the situation at hand is an opportunity to be heard in *some* ART. III court as a matter *of right*.[38]

CONCLUSION

For the foregoing reasons, and in light of the showing heretofore made, we respectfully submit that a summary disposition of this appeal would not be proper. We suggest that the case be docketed for plenary consideration pursuant to the terms and conditions previously suggested in the procedural motions that were presented to this Court in combination with our MOTION FOR LEAVE TO FILE our PETITION FOR WRITS OF MANDAMUS.

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[36] See their MOTION at 16.

[37] See our JURISDICTIONAL STATEMENT at 54-5.

[38] *Id.* at 49-54.

GERARD R. MORAN
Counsel for Appellant

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No. 70

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

EASTERN STATES PETROLEUM CORP.,
Appellant,

v.

WILLIAM P. ROGERS,
Attorney General of the United States,
et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO RECALL THE JUDGMENT AND REINSTATE THE APPEAL

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IN THE

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OCTOBER TERM, 1959

No. 70

EASTERN STATES PETROLEUM CORP.,

Appellant,

v.

WILLIAM P. ROGERS, Attorney General of the United States, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO RECALL THE JUDGMENT AND REINSTATE THE APPEAL

Pursuant to Revised Rule 35 and the procedural precedents cited hereafter, appellant moves the court for an order which recalls the summary judgment of dismissal, 361 U. S. 7 (October 12, 1959), and redockets appellant's appeal.

Supporting Showing.

In support of this Motion appellant respectfully directs the attention of the Court to the following considerations:

I. Changed Circumstances. (Resume of case included):

A. *Exhaustion of Alternative Proceeding:* Following this Court's aforecited dismissal of direct appeal No. 70, 1959 Term, and this Court's simultaneous denial, 361 U. S. 805 (Oct. 12, 1959), of direct review by a proposed proceeding for extraordinary writs: Misc. No. 34, 1959 Term, Eastern States proceeded to perfect and argue its alternative appeal to the Court of Appeals for the District of Columbia Circuit; that appeal had been stayed to afford traditional priority to the direct proceedings in this Court.

On May 12, 1960 the Court of Appeals affirmed the District Judge's judgment, dismissing Eastern States Complaint brought under 28 U.S.C. §§1331 and 2282, which had been entered in the District Court pursuant to the memorandum decision by Judge McGarraghy, sitting alone, 177 F. Supp. 944 (D.D.C. 1958). The opinion of the Court of Appeals reached but rejected appellant's contentions on the questions concerning District Court jurisdiction and Eastern States' statutory and Constitutional rights to be heard, which were presented to this Court as Questions II, III, IV and V of the Jurisdictional Statement supporting our direct appeal to this Court. The opinion of the Court of Appeals is appended as Exhibit A.

Eastern States timely petition to the Court of Appeals for a rehearing *en banc* was denied on June 7, 1960; the order is appended as Exhibit B.

B. *Intervening Decision:* Since summarily dismissing Eastern States' appeal, this Court has adopted, upon plenary consideration, the critical subpoint of counsel's

contention in favor of this Court's jurisdiction over Eastern States' appeal, *viz.* the point that this Court's jurisdiction over appeals under Section 1253 *now* depends on the characteristics of the Complaint, not upon the nature of the result in the District Court. See *Florida Lime Growers v. Jacobsen*, 362 U. S. 73 (1960), quoted in II. B. 2, *infra*. Compare our Jurisdictional Statement at pp. 22-5 and 30.

II. Legal Contentions

A. *Concerning Form of Procedure and Timeliness:* In support of the procedural propriety and the timeliness of this Motion, appellant invokes two independent lines of authority.

(1) Appellant's prime argument assumes, (as we develop hereafter in Part B. 1), that this Court's orders of October 12 are properly to be read as being grounded upon an implicit conclusion that resort to this Court is currently judged to be premature when an appeal to a Court of Appeals is, *or may be*, available, under 28 U.S.C. 1291, despite its limiting exception in favor of direct appeals to this Court. If that assumption is sound, now that Eastern States has exhausted that less extraordinary opportunity for possible relief, without success, unripeness or exhaustion considerations no longer preclude resort to this Court. And, thus, it is now timely for Eastern States to tender to this Court the thus far unresolved question whether a claim for appellate relief like Eastern States' now falls within or without this Court's obligatory jurisdiction under Section 1253 (and hence within or without the jurisdiction of the Courts of Appeals under Section 1291 and its limiting exception). Appellant contends that this Motion is a proper and timely procedure for tendering that unresolved and now ripe question to this Court

for decision; the grounding of the Motion and favorable decision in *Cahill* v. *New York, New Haven & Hartford R. Co.*, 351 U. S. 183 (1956) provides persuasive, if not directly controlling, support for this contention. Indeed, the fact that this Motion was not preceded by a prior unsuccessful petition for rehearing, similarly grounded, make a granting of this Motion much less procedurally controversial than the grant of the Motion in the *Cahill* case, *supra*.

(2) Assuming that the summary dismissal of Eastern States' appeal is to be read as being grounded on an implicit conclusion against the existence of jurisdiction under Section 1253, (rather than on the prematurity ground on which we believe it was grounded), appellant contends that reconsideration of that conclusion is procedurally proper and presently timely, pursuant to the reasoning in *United States* v. *Ohio Power Co.*, 353 U. S. 98 (1957), and on analogy to the tenor of Rev. Rule 58 (2) because of this Court's subsequent decision, *during this term*, establishing the critical subpoint of our contention in support of this Court's jurisdiction, under Section 1253, over Eastern States' appeal; *see Florida Lime Growers* v. *Jacobsen*, quoted in part IV, 2, *infra*. Indeed, the fact that this Motion, the judgment sought to be recalled, and the *Lime Growers* decision have all come during the one, current, Term, make the granting of this Motion much less procedurally controversial that the grant of the petition in the *Ohio Power* case, *supra*. Moreover, the order sought to be recalled here clearly contemplated further (alternative) proceedings, and, thus, the doctrine of repose pertinent here is "law of the case", not "res judicata". And, "[i]n the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the Court rendering them in the same case, merely expresses the practice of courts

generally to refuse to reopen what has been decided, not a limit to their power." See *Messenger* v. *Anderson*, 225 U. S. 436, 444 (1912). See also *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 199 (1950): "* * * the law of the case is only a discretionary rule of practice. It is not controlling here."

B. *Concerning the Propriety of Redocketing Eastern States' Appeal.*

Appellant-movant's alternative contentions in support of a redocketing of the appeal have been incidentally stated above.

Our first contention is that the orders of October 12 are properly to be read as being grounded on a prematurity ground, no longer operative. It remains here to show, in subdivision (1), that such a reading of the orders of October 12th is professionally proper.

Our alternative contention is that the order of October 12th, *summarily* dismissing this appeal, if properly to be read as being grounded on an *implicit* conclusion that this Court lacked jurisdiction under Section 1253, should be reconsidered in order to achieve conformity with the *expressed* conclusions concerning the proper determinant of jurisdiction under Sec. 1253, announced, after *plenary* consideration, in the *Line Growers* case. It remains here, in subdivision (2), to cite and quote that conclusion and to show how it conflicts with any (assumed) conclusion that this Court lacked jurisdiction under Section 1253 over Eastern States' appeal.

The solid substantiality and public importance of the questions that will be presented for decision, if this Court entertains this appeal, was documented in our Jurisdictional Statement and in our Petition For Writs of Mandamus. The opinion of the Court of Appeals crystalized these questions into sharper issues. But, the grounds

on which that opinion rejected Eastern States contentions did not disclose any previously overlooked arguments or authorities, nor otherwise undermine the solid substantiality of appellant's contentions. Thus, appellant will not burden this Motion with a repetition of its prior showing concerning the substantiality of Questions II, III, IV and V or with the further authorities and arguments presented to the Court of Appeals.

(1) This Court's summary decisions of October 12th, denying direct review of the memorandum dismissal of the single judge below, included no citation to controlling authority. However, the order which dismissed the direct appeal was worded so as to grant the dismissal alternative of appellees' Motion To Dismiss or Affirm. But that dismissal motion was grounded on alternative, inconsistent, positions; ultimately, however, it rested upon a contention that:

> "Appellant here has filed timely notice of appeal to the Court of Appeals for the District of Columbia Circuit. The decision of the single judge district Court, if erroneous, can be corrected in that court. Hence this Court's dismissal of the present appeal would not affect appellant's *proper* remedy. *Cf. Phillips* v. *United States*, 312 U. S. 246, 254." (Emphasis Supplied).

See appellees' Motion To Dismiss or Affirm at p. 12.

But this (apparent) contention that Eastern States' (only) "proper remedy" was an appeal to the Court of Appeals is in direct conflict with this Court's thus far unrepudiated holding in *Stratton* v. *St. Louis S. W. R. Co.*, 282 U. S. 10, 16 (1930). What then is the meaning properly to be drawn by the profession from this Court's order?

The answer is not clear. Indeed, the Justices may well have joined in a conclusion to dismiss on several differing

grounds. In these circumstances, and since appellant conceded, at page 5 of its Brief in Opposition to Appellees' Motion, citing 18 U.S.C. §3731 and *Ex parte Cogdell*, 342 U. S. 163 (1953), that

> "* * * recognition of jurisdiction over appeals, adequate to permit a determination whether an action was or was not one which required trial by three judges, in *both* this Court and the Courts of Appeals would not be unprecedented,"

appellant suggests the propriety of a reading of the summary dismissal of October 12th, as follows: The dismissal order of October 12th is properly to be read as resting upon the narrow ground, building on the reasoning in *Ex parte Cogdell, supra*, that deliberations in this Court of single judge rejections of contentions that claims require three judge-direct appeal determination are now premature before exhaustion of any possibility of review in the Courts of Appeals under Section 1291 not foreclosed, via its limiting exception, by prior holdings in favor of exclusive jurisdiction in this Court under Section 1253.

In further support of a narrow reading of the dismissal order of October 12th, appellant suggests that such a reading would merely effect a further limitation of *Stratton*, in favor of this Court's modern conservatism concerning *direct* review of single-judge decisions, by any form-of-proceeding; and, such a reading would avoid a summary and silent repudiation of the landmark holding, in *Ex parte Metropolitan Water Co.*, 220 U. S. 539 (1911), which established that one asserting a three judge-direct appeal claim is entitled by those statutes to resort to those Courts *as a matter of right* not of this Court's discretion, as would be the situation if resort here were possible only by petition for certiorari to the Court of Appeals. The holding in *Ex parte Metropolitan Water*

Co., is set forth and discussed in the Jurisdictional Statement at 17 note 6 and 27-30.

The difference between the dismissal here and the stay in *Ex parte Cogdell*, *supra* lacks critical meaning. See *Far East Conference* v. *United States*, 342 U. S. 570, 576-7 (1952).

2. As clearly set forth in our Jurisdictional Statement at 3-5, 22-25 and 30, and amplified at pages 3-4 of our Brief In Opposition to appellees' Motion To Dismiss, appellant has contended that a question, as here, whether or not this Court has jurisdiction over an appeal under Section 1253 now turns (as does a question concerning three judge jurisdiction under Sections 2281 and 2282), upon whether the complaint and "action" is or is not judged to be of the type described in Sections 2281, 2282 and 2284, rather than, as was formerly true, upon the form of the result in the District Court (and, at the trial level, upon whether an application for a preliminary injunction was or was not filed and pressed in the case).

The majority and dissenting opinions in *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73 (1960) concur in recognizing that it is the character of the "complaint", not of the "result" in the District Court, which determines whether or not this Court has jurisdiction under Section 1253 over an appeal. As Justice Frankfurter put it in his dissent:

> "I start with the proposition, as I understand the Court to do, that whether a case is one directly appealable here under 28 U.S.C. 1253, 28 U.S.C.A. §1253, depends upon the complaint, and not upon the result in the District Court."

See 362 U. S. at 89. In the opinion for the Court, see 362 U. S. at 75-6, 81 and 85.

If the summary dismissal of Eastern States' appeal is properly to be read as resting upon an implicit conclusion

against jurisdiction under Section 1253, rather than on a prematurity ground, as we believe to be proper, then the expressed conclusions in the *Lime Growers* case, establishing the proper determinant for the presence or absence of jurisdiction under Section 1253, dictate reconsideration of this Court's jurisdiction, under Section 1253, over Eastern States' appeal, because, as was just shown, the jurisdictional contention of Eastern States was critically grounded on *the* position, concerning *the* proper determinant of jurisdiction under Section 1253, that was subsequently adopted by this Court, after plenary consideration, in the *Lime Growers* decision.

Conclusion

Wherefore, appellant moves the Court to enter an order recalling its October judgment of dismissal and redocketing Eastern States' appeal. Appellant further prays that the order redocketing the appeal direct that the case be docketed for plenary consideration and scheduled for an oral argument of at least one hour's duration.

Respectfully submitted,

GERARD R. MORAN,
Counsel for Appellant.

APPENDIX OF EXHIBITS

Exhibit A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15109

EASTERN STATES PETROLEUM CORPORATION, APPELLANT

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided May 12, 1960

Mr. Gerard R. Moran, of the bar of the Supreme Court of Virginia, *pro hac vice*, by special leave of court, with whom *Mr. Edwin G. Martin* was on the brief, for appellant.

Mr. Seymour Farber, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Messrs. Oliver Gasch*, United States Attorney, and *Alan S. Rosenthal*, Attorney, Department of Justice, were on the brief, for appellees.

Before WILBUR K. MILLER, BAZELON and FAHY, Circuit Judges.

BAZELON, *Circuit Judge*: This appeal from the District Court relates to appellant's attack, begun in the United States Customs Court some eight years ago, upon the tax

rate imposed upon petroleum imports between January 1, 1951 and October 11, 1952. The Customs Court proceedings were stayed pending the outcome of two other cases raising substantially identical questions. The importers in these cases contended that the President's proclamation increasing the duty from one-fourth to one-half cent per gallon was contrary to statute and an unconstitutional exercise of power.[1] The Court of Customs and Patent Appeals ultimately rejected these claims and the Supreme Court denied certiorari.[2]

Appellant, whose case is still pending in the Customs Court, then brought the instant suit to enjoin the Attorney General, the Secretary of the Treasury, and their subordinates from enforcing the tax through proceedings in the customs courts.[3] The complaint asserted that, as a result of the unfavorable decisions in the two companion cases, appellant's opportunity to secure recognition of its constitutional rights in the customs courts has become "so onerous, hazardous and speculative that it constitutes an inadequate remedy * * * which plaintiff may by-pass" to secure redress in a tribunal with statutory authority to enjoin administrative officials. It also asserted that Article III and the due process clause of the Constitution entitle it to have its constitutional claims

1. Specifically, the importers' position is that a provision in the Reciprocal Trade Agreements Act then in force, 19 U.S.C. § 1351 (1952), prohibited the President from increasing the duty by more than fifty percent. The importers further contend that if, as the Court of Customs and Patent Appeals held, such limitation does not apply to the type of increase here involved, there are no constitutionally adequate statutory standards to guide the President in the exercise of his rate revising authority.

2. *United States* v. *Marcus Trading Foreign Corp.*, 42 C.C.P.A. (Customs) 38, *cert. denied*, 348 U.S. 858 (1954); *United States* v. *American Bitumuls & Asphalt Co.*, 240 F.2d 270, 44 C.C.P.A. (Customs) 139, *cert. denied*, 355 U.S. 883 (1957).

3. This refers to both the Customs Court and the Court of Customs and Patent Appeals.

adjudicated in a court created under Article III. Appellant requested that a three-judge court be convened, pursuant to the provisions of 28 U.S.C. § 2282 (1958).

The Government moved to dismiss the complaint for lack of jurisdiction. District Judge McGarraghy, sitting alone, granted the Government's motion. Appellant thereupon applied to the Chief Judge of this Circuit for an order designating two additional judges to complete a three-judge district court. Chief Judge Prettyman denied the motion.[4] Appellant then sought review from Judge McGarraghy's ruling by direct appeal to the Supreme Court, and moved for leave to file a petition for a writ of mandamus against Chief Judge Prettyman and District Judge McGarraghy. The Supreme Court dismissed the appeal and denied the motion.[5] Appellant thereupon prosecuted the present appeal from the dismissal below.[7]

We think the District Court correctly decided that it lacked jurisdiction. Under the distribution of judicial power which Congress has established, the Customs Court has "*exclusive* jurisdiction to review on protest the decisions of any collector of customs. * * *" 28 U.S.C. § 1583 (1958) (emphasis supplied). Conversely, 28 U.S.C. § 1340 provides that "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for * * * revenue from imports or tonnage *except matters within the jurisdiction of the Customs Court*." 28 U.S.C. § 1340 (1958) (emphasis sup-

4. 105 U. S. App. D.C. 219, 265 F.2d 503 (1959).

5. *Eastern States Petroleum Corp.* v. *Peterson*, 361 U.S. 7 (1959).

6. *Eastern States Petroleum Corp.* v. *Prettyman*, 361 U.S. 805 (1959).

7. Our jurisdiction to review the action of the District Court is not questioned. *See Wilkes* v. *Southern Pacific Co.*, 231 F.2d 139 (9th Cir.), *cert. denied*, 351 U.S. 940 (1956).

Appellant protected its right of appeal to this court by securing from the District Court extensions of the time in which to docket the record on appeal.

plied). This jurisdictional scheme is not limited to non-constitutional matters, for it is clear that the customs courts can and do, as in the two companion cases, pass upon constitutional questions. *Horton* v. *Humphrey*, 146 F. Supp. 819, 821 (3-judge court, D.D.C.), *affirmed per curiam*, 352 U. S. 921 (1956); *Morgantown Glassware Guild, Inc.* v. *Humphrey*, 98 U. S. App. D.C. 375, 236 F. 2d 670, *cert. denied*, 352 U. S. 896 (1956). Decisions of the Court of Customs and Patent Appeals are reviewable in the Supreme Court on writ of certiorari, 28 U.S.C. § 1256 (1958).

Appellant contends, however, that the District Court has jurisdiction notwithstanding the exception in § 1340, since this is not a case "arising under any Act of Congress providing for * * * revenue from imports * * *." Rather, they contend it is a case "arising under the Constitution, laws, or treaties of the United States," and thus within the ambit of 28 U.S.C. § 1331 (1958). Section 1331 vests federal question jurisdiction in the district courts and, unlike § 1340, contains no exception relating to Customs Court jurisdiction. But we do not agree that Congress' failure to provide an exception to § 1331 similar to that specified in § 1340 indicates an intent to open a loophole in its clear purpose to exclude customs cases from the district courts. When Congress provides a specific judicial remedy, relief may generally be accorded only through the specified procedure. Cf. *Lichter* v. *United States*, 334 U. S. 742, 789-93 (1948); *Lockerty* v. *Phillips*, 319 U. S. 182 (1943). Moreover, the right to equitable relief presupposes the non-existence of an adequate remedy at law. The customs courts provide an adequate remedy except in cases of extreme hardship, *Horton* v. *Humphrey*, *supra*. The fact that the customs courts are likely to reject appellant's constitutional claims does not make this a case of unusual hardship. *Cottman* v. *Dailey*, 94 F.2d 85, 89 (4th Cir., 1938).

Appellant attacks the foregoing construction of these jurisdictional statutes on the ground that, at some stage of the litigation, it is constitutionally entitled to have its constitutional claims heard and determined in an Article III court, and that such a hearing must be available as of right and not as a matter of discretion.

There is at the outset considerable doubt as to whether the customs courts are legislative rather than Article III courts. Some years ago, the Supreme Court held that the Court of Customs Appeals (now the Court of Customs and Patent Appeals) was a legislative court, *Ex parte Bakelite Corp.*, 279 U. S. 438 (1929); that is to say, it was a court created under the congressional power "to lay and collect Taxes, Duties, Imposts and Excises," U. S. Const. art. I, § 8, and not under the power to "ordain and establish" courts inferior to the Supreme Court, U. S. Const. art. III, § 1. But Congress has recently revised the statutes creating the customs courts and stated that they are "hereby declared to be * * * court[s] established under Article III of the Constitution of the United States." 28 U.S.C. §§ 211, 251 (1958). Petitioner contends, however, that such declaration is ineffective to create an Article III court because the Supreme Court said in *Bakelite* that "whether a court is of one class or the other [does not] depend on the intention of Congress * * * the true test lies in the power under which the court was created and in the jurisdiction conferred." 279 U. S. at 459. But see 1 Moore, Federal Practice, ¶ 0.4[4] (1959).

We do not decide, however, whether the expression of congressional intent is sufficient to transform the customs courts into Article III tribunals. For even if the customs courts are still legislative courts we think petitioner's argument must fail. It was previously, and we think correctly, rejected in *Ricomini* v. *United States*, 69 F.2d 480, 483-84 (9th Cir. 1934).

We recognize, as appellant argues, that "A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored." *Lockerty v. Phillips*, 319 U. S. 182, 188 (1943); see *Lynch v. United States*, 292 U. S. 571, 586-87 (1934). And we assume, for present purposes, that the congressional power to confer and withdraw federal jurisdiction is itself subject to constitutional limitations, including those of due process. *Crowell v. Benson*, 285 U. S. 22, 58 (1932); *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2d Cir.), *cert. denied*, 335 U. S. 887 (1948); see HART & WECHSLER, FEDERAL COURTS AND THE FEDERAL SYSTEM 312-40 (1953). But this is not a case where there is an asserted constitutional right without a constitutionally adequate remedy. Certiorari may be sought in what is obviously an Article III court. And even in cases where an adverse decision of the customs courts involving constitutional questions stands unreviewed, we do not think the taxpayer is denied due process. In our view, the distinctions between the customs courts and the district courts do not rise to a level at which it may be said that final adjudication of constitutional questions in the customs courts offends the requirements of due process. Judges of the customs courts, like judges of Article III courts, are appointed by the President, with the advice and consent of the Senate, and serve during good behavior.[8] Customs courts entertain "cases and controversies" within the meaning of Article III, as shown by the fact that these cases are reviewable

8. See 28 U.S.C. § 213 (Court of Customs and Patent Appeals), § 252 (Court of Customs), § 44 (circuit courts), § 134 (district courts) (1958).

Judges of the Customs Court receive the same salary as district judges, compare 28 U.S.C. § 213 (1958) with 28 U.S.C. § 135 (1958); judges of the Court of Customs and Patent Appeals receive the same salary as circuit judges, compare 28 U.S.C. § 252 (1958) with 28 U.S.C. § 44(d) (1958).

by the Supreme Court under its appellate jurisdiction.[9] We therefore reject appellant's constitutional objections to its exclusion from the District Court.

The only remaining question is whether the District Court was authorized to dismiss the complaint without requesting the convening of a three-judge court.[10] Prior to 1942, the law was well settled that "the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction" and "does not require three judges to pass upon this initial question of jurisdiction." *Ex parte Poresky*, 290 U. S. 30, 31-32 (1933).

Petitioner asserts, however, that the 1942 amendment providing that "A single judge shall not * * * dismiss the action" has overturned the prior rule.[11] Although there

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9. *United States v. Stone & Downer Co.*, 274 U.S. 225, 232-33 (1927); *see, e.g., Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933); cf. *Pope v. United States*, 323 U.S. 1, 13-14 (1944). See generally ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §§ 248-49 (2d ed. Wolfson & Kurland 1951).

10. 28 U.S.C. § 2282 (1958) provides that an "injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted * * * [except] by a district court of three judges under section 2284 of this title."

11. 28 U.S.C. § 2284 now reads in pertinent part:

> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.
>
> * * *
>
> (5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil

are some shreds of legislative history to support this view,[12] consistent judicial construction has rejected it. In *White* v. *Gates*, 102 U. S. App. D.C. 346, 253 F.2d 868, *cert. denied*, 356 U. S. 973 (1958), this court said, "without convening a three-judge court * * * a single judge may still dismiss a complaint that * * * fails to raise a substantial constitutional question." The Ninth Circuit reached the same conclusion in *Wicks* v. *Southern Pacific R.R.*, 231 F.2d 130 (9th Cir.), *cert. denied*, 351 U. S. 946 (1956). And in *Jacobs* v. *Tawes*, 250 F.2d 611 (4th Cir. 1957), the Fourth Circuit held that a single judge may dismiss an application for a three-judge court if the district court, no matter how constituted, lacks jurisdiction. Finally, Chief Judge Prettyman, in an earlier phase of this litigation, reached the same conclusion. 105 U. S. App. D.C. 219, 265 F.2d 593 (1959). As these decisions make clear, the provision of § 2284 precluding single-judge dismissal, along with the other procedural requirements of that section, becomes operative only after a three-judge court is convened. This is implied from the introductory passage of § 2284, reprinted in the margin at note 7.

The action of the District Court is therefore

Affirmed.

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procedure. *A single judge shall not* appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or *dismiss the action*, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing. [Emphasis supplied.]

12. Petitioner places particular reliance upon a report of the Bar Association of the City of New York stating that it believed the bill would overrule *Ex parte Poresky*, 290 U. S. 30 (1933), and that this result was desirable. See H R Rep No. 1677, 77th Cong., 2d Sess. 5 (1942). But there is no indication that any member or committee of Congress embraced this suggestion or anticipated such a result.

Exhibit B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,109 September Term, 1959

EASTERN STATES PETROLEUM CORPORATION,
Appellant,

v.

WILLIAM P. ROGERS, Attorney General of the United States, *et al.*,
Appellees.

Before: Prettyman, Chief Judge, Edgerton, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Basfian and Burger, Circuit Judges, in Chambers.

ORDER

Upon consideration of the appellant's petition for rehearing en banc, it is

ORDERED by the court that the petition for rehearing en banc is denied.

Per Curiam.

Dated: June 7, 1960